# Customs Bulletin

**Regulations, Rulings, Decisions, and Notices concerning Customs and related matters**

# and Decisions

**of the United States Court of Customs and Patent Appeals and the United States Court of International Trade**

Vol. 15 JANUARY 28, 1981 No. 4

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 81-14)

### Coastwise Transportation—Customs Regulations Amended

Sections 4.93(b)(1) and 4.93(b)(2), Customs Regulations, amended to add the Polish People's Republic and Kuwait to the lists of nations whose registered vessels are permitted to transport certain articles coastwise

### TITLE 19—CUSTOMS DUTIES

### CHAPTER I—U.S. CUSTOMS SERVICE

#### PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add the Polish People's Republic and Kuwait to the lists of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports. The Department of State has received satisfactory evidence that both the Polish People's Republic and Kuwait place no restrictions on the transportation of the specified articles by vessels of the United States between ports in those countries. This amendment provides reciprocal privileges for vessels registered in the Polish People's Republic and Kuwait.

EFFECTIVE DATES: May 14, 1980, as to vessels of the Polish People's Republic and May 16, 1980, as to vessels of Kuwait.

FOR FURTHER INFORMATION CONTACT: Donald H. Reusch, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-5706.

SUPPLEMENTARY INFORMATION:

#### BACKGROUND

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. 883) (the Act), provides generally that no merchandise shall be trans-

ported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by U.S. citizens. However, the Act, as amended by Public Law 90–474 (82 Stat. 700; T.D. 68–227), provides that if the Secretary of State advises the Secretary of the Treasury that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the United States will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. The Polish People's Republic is among the countries listed. Those nations found to grant reciprocal privileges to vessels of the United States for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with such barges; certain empty instruments of international traffic; and certain stevedoring equipment and material are listed in section 4.93(b)(2), Customs Regulations (19 CFR 4.93 (b)(2)).

On May 14, 1980, the Department of State advised the Secretary of the Treasury that the Polish People's Republic now places no restrictions on the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; emply barges specifically designed for carriage aboard a vessel and certain equipment for use with such barges; certain empty instruments of international traffic; and certain stevedoring equipment and material by vessels of the United States between ports in that country. In addition, on May 16, 1980, the Department of State advised the Secretary of the Treasury that Kuwait places no restrictions on the transportation of any of the articles listed in the Act by vessels of the United States between ports in that country. Therefore, appropriate reciprocal privileges are to be accorded to vessels registered in the Polish People's Republic as of May 14, 1980, and to vessels registered in Kuwait as of May 16, 1980.

FINDING

On the basis of the information received from the Secretary of State, as described above, I find that the Governments of the Polish People's Republic and Kuwait place no restrictions on the transportation of the articles specified in section 27 of the Merchant Marine Act of 1920, as amended, by vessels of the United States between ports in those countries. Therefore, appropriate reciprocal privileges are accorded

to vessels registered in the Polish People's Republic as of May 14, 1980, and to vessels registered in Kuwait as of May 16, 1980.

### AMENDMENTS TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in Polish People's Republic and Kuwait, section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), is amended by inserting Kuwait in appropriate alphabetical order in the list of nations under that section. Section 4.93(b)(2), Customs Regulations (19 CFR 4.93(b)(2)), is amended by inserting Kuwait and Polish People's Republic in appropriate alphabetical order in the list ot nations under that section.

(Sec. 27, 41 Stat. 999, as amended, sec. 14, 67 Stat. 516, Public Law 90–474, 82 Stat. 700 (5 U.S.C. 301, 19 U.S.C. 1322(a), 46 U.S.C. 883).)

### INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because these are minor amendments in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because these amendments grant an exemption.

### REGULATION DETERMINED TO BE NONSIGNIFICANT

In a directive published in the Federal Register on November 8, 1978 (43 F.R. 52120), implementing Executive Order 12044, "Improving Government Regulations," the Treasury Department stated that it considers each regulation or amendment to an existing regulation published in the Federal Register and codified in the Code of Federal Regulations to be significant. However, regulations which are nonsubstantive, are essentially procedural, do not materially change existing or establish new policy, and do not impose substantial additional requirements or costs on, or substantially alter the legal rights or obligations of, those affected, with secretarial approval may be determined not to be significant. Accordingly, it has been determined that this document does not meet the Treasury Department criteria in the directive for significant regulations.

### DRAFTING INFORMATION

The principal author of this document was James A. Seal, Regulations and Information Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices of the

Customs Service and the Departments of State and the Treasury participated in its development.

Dated: December 30, 1980.

RICHARD J. DAVIS,
*Assistant Secretary of the Treasury.*

[Published in the Federal Register, Jan. 19, 1981 (46 F.R. 5120)]

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(T.D. 81-15)

## Customs Approved Public Gauger

Approval of public gauger performing gauging under standards and procedures required by Customs

Notice is hereby given pursuant to the provisions of section 151.43 of the Customs Regulations (19 CFR 151.43) that the application of Pan Pacific Surveyors, Inc., 617 Avalon Boulevard, Wilmington, Calif. 90744, to gauge imported petroleum and petroleum products is all Customs districts in accordance with the provisions of section 151.43 of the Customs Regulations is approved.

Dated: January 12, 1981.

A. PIAZZA,
*Director,*
*Entry Procedures and Penalties Division.*

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(T.D. 81-16)

## Bonds

Approval to use authorized facsimile signatures and seals; T.D. 79-241 amended

The use of facsimile signatures and facsimile seals on Customs bonds by the following corporate sureties has been approved effective January 12, 1981. Each corporate surety has provided the Customs Service with a copy of each signature that is to be used, a copy of the corporate seal, and a certified copy of the corporate resolution agreeing to be bound by the facsimile signatures and seals and is without prejudice to each surety's right to affix signatures and seals manually.

Continental Casualty Co., Chicago, Ill.
Authorized facsimile signatures on file for:
John J. Sheppard, attorney-in-fact, witness.
John K. Daily, attorney-in-fact, witness.
James M. Gorman, attorney-in-fact, witness.

American Casualty Co., of Reading, Pa., Chicago, Ill.
John J. Sheppard, attorney-in-fact, witness.
John K. Daily, attorney-in-fact, witness.
James M. Gorman, attorney-in-fact, witness.
National Fire Insurance Co. of Hartford, Chicago, Ill.
John J. Sheppard, attorney-in-fact, witness.
John K. Daily, attorney-in-fact, witness.
James M. Gorman, attorney-in-fact, witness.

MARILYN G. MORRISON,
*Director,*
*Carriers, Drawback and Bonds Division.*

# U.S. Customs Service

## *Customs Service Decisions*

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
*Washington, D.C.*

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

DONALD W. LEWIS,
*Director,*
*Office of Regulations and Rulings.*

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(C.S.D. 81-1)

Classification: Unfinished Pipe Ells (Elbows); General Interpretative Rule 10(c); Forgings; Pipe Fittings

Date: May 23, 1980
File: CLA-2:RRUCGC
065046 E

Re Decision on application for further review of Protest No. 3901-8-000881 of September 11, 1978.

DISTRICT DIRECTOR OF CUSTOMS,
*Chicago, Ill.*

DEAR SIR: This protest was filed against your decision classifying merchandise covered by Entry No. 154851 of August 4, 1977, under the provision for pipe fittings of steel, other, in item 610.80, TSUS, with duty at the rate of 11 percent ad valorem. The protest, timely filed on September 11, 1978, claims that the merchandise consists of elbow forgings of steel, not machined, tooled, or otherwise processed after forging, and is properly classifiable under the provision for forgings of steel in item 608.25, TSUS dutiable at the rate of 6 percent ad valorem, citing *J. Gerber & Co., Inc. et al.* v. *United States*, 62 Cust. Ct. 368, C.D. 3773 (1969), aff'd 58 CCPA 110, C.A.D. 1013 (1971).

The merchandise involved is shown on the commercial invoice as consisting of standard 90 degree long radius ells, 8-inch, at a unit price of $11.34 per piece. Also on the commercial invoice and on the special customs invoice, the merchandise is described as "forgings as per sample submitted, not shot blasted, nor in any way advanced beyond the forging state, suitable to make standard 90 deg. long radius elbows, Spec. WPB."

In the appellate case cited by the protestant, there was no discussion as to what constitutes a forging, the court stating, "They are forgings, it is undisputed, and they are also dedicated for use as pipe or tube fittings of steel." The court did indicate, however, that the forgings it had in mind were articles produced by a process which was relatively expensive, requiring heavy equipment and skilled labor to produce a higher quality metal, and was used when less costly methods would not do. With respect to the production of the subject merchandise, the protestant states, "The elbow forging is produced from a piece of steel in a forging operation which consists of heating the steel and bending it to the desired shape of the elbow forging. Nothing further is done beyond this process."

Tubular steel elbows were the subject of *Herbert B. Moller and U.S. Wolfson Bros. Corp.* v. *United States*, 46 CCPA 89, C.A.D. 704 (1959), wherein the issue was whether the merchandise was classified as steel tubes or as articles not specially provided for, whether partly or wholly manufactured. The merchandise in that case consisted of seamless steel elbows bent to 45 and 90 degree angles. They were manufactured by heating a length of steel tubing, bending it to the desired angle, cutting to the desired length, beveling the ends, and then cleaning and painting. In use, the elbows were welded into a system of tubing for the transmission of liquids or gases.

This description of the manufacture of steel elbows from tubes coincides with information received from reputable sources in the forging industry, that the only method of manufacturing pipe ell forgings is by forging over preexisting tubing which is already a wrought product. We conclude, therefore, that the elbows involved are produced from a tube rather than a piece of steel as the protestant states. Further, the imported ells are not suitable to make standard ells, but to be finished into standard ells.

In Headquarters letter of March 11, 1977, (047541 DB), the view was expressed that unfinished pipe ells were properly classifiable as pipe or tube fittings, of iron or steel, other, in item 610.80, TSUS, and not under the provision for forgings of steel, not machined, not tooled, and not otherwise processed after forging, in item 608.25. The basis for that decision was that it was not the intent of Congress to classify tubes or articles made therefrom, fittings, as forgings, noting headnote

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3(e), part 2, schedule 6, TSUS, and assuming that the unfinished ells were described in both provisions, the provision for pipe or tube fittings more specifically described the unfinished ells than did the provision for forgings.

Since the protestant relies on C.A.D. 1013, we deem it advisable to comment on the appellate opinion in that case to show that there are a number of distinguishing facts between the flanges which were the subject of that case and the unfinished 8-inch ells or elbows, as well as to comment on the basis of that opinion.

In C.A.D. 1013, it was undisputed that the merchandise consisted of forgings. If one follows the court's comment that "forging produces a higher quality metal and is used when less costly methods will not do," citing the Tariff Information Surveys (1921), and looks to the description of forgings as set forth in the Summary of Tariff Information 1921, which the U.S. Tariff Commission prepared for the Congress in enacting the Tariff Act of 1922, it would appear that the court may have understood the forging before it to be like that described in Summary as follows:

> Forgings are metals which have undergone the process of hammering or pressing into special shapes while hot. Originally forging was solely a hammering process, but with large masses to be treated, pressing has come into use, especially for making heavy forgings of steel.

The facts presented in this case indicate that the unfinished elbows were made from tubes by bending and there is no showing that they were made by a hammering process or pressing. In modern commercial practices, the term forging is very broad and refers to articles produced by the process of giving the metal increased utility by shaping it, refining it, and improving its mechanical properties through controlled plastic deformation under impact or pressure. It includes such processes as compression between flat dies, called upsetting, compression between narrow dies, rolling, impression die forging, extrusion, and piercing. Bending, which gives the imported merchandise its shape, is considered an auxiliary operation. (See Forging Industry Handbook.)

In C.A.D. 1013, the court discusses the doctrine of relative specificity in terms of which provision, forgings or pipe fittings, was the most difficult to satisfy. When TSUS was enacted in 1963, the drafters promulgated General Interpretative Rule 10(c), which specifies that when two provisions describe an article, it shall be classifiable under that provision which most specifically describes it. Comparing a provision for forgings, which only informs one concerning the process by which the article is made, with a provision for pipe fittings, which informs one of an article used in a certain manner for a certain purpose and describes a class of articles, there is no question but that the

provision for pipe fittings more specifically describes the unfinished elbows. The court in C.A.D. 1013 does not mention General Interpretative Rule 10(c).

It is true as the court states in C.A.D. 1013, that the provision for forgings has remained substantially unchanged since the act of 1909. However, what has changed through the years is the forging industry. The Forging Industry Handbook states:

> Metals previously thought unforgeable are now processed routinely. The refinement of manufacturing methods and the development of more efficient and larger production equipment have resulted in higher quality and greater economy in forgings spanning a continually increasing range of shapes and sizes.

The opinion in C.A.D. 1013 cites with approval as support for its conclusion, the case of *United States* v. *The Singer Mfg. Co.*, 37 CCPA 104, C.A.D. 427 (1950), involving rough castings of iron which were held to be classifiable as castings rather than as unfinished parts of machines. The difficulty with citing that decision is that it was not rendered under TSUS, and under TSUS is contrary to *John V. Carr & Son, Inc.* v. *United States*, 74 Cust. Ct. 10, C.D. 4580 (1975), holding unfinished hub castings to be classifiable as parts of machines and not as cast-iron articles, and under the circumstances, had C.A.D. 427 been decided under TSUS, the result would have been different. Furthermore, the appellate court under TSUS in *The Acme Shear Co.* v. *United States*, 63 CCPA 12, C.A.D. 1159 (1975), held that nonmalleable cast-iron articles in the form of unfinished shear blade castings which had not been processed beyond the casting state except for cleaning the excess metal were classifiable as unfinished shear blades and not as articles of iron. While the court distinguished C.A.D. 427, on the basis of different statutory language under the Tariff Act of 1930, and TSUS, the question remains as to why the Congress would want to treat forgings differently from castings, for both describe articles by the process used in making them, and both are most often dedicated to a particular use as a part of some machine.

With respect to the opinion in C.A.D. 1013 that the Congress has historically wanted forgings to be classed and dealt with as forgings, and has put into the new schedules nothing to state a contrary intention, the court overlooked headnote 1(iv), part 2, of schedule 6 (note C.A.D. 1098), the specific provision for tube fittings which was not in the Tariff Act of 1930, and General Interpretative Rule 10(c). Even under prior tariff acts, the court overlooked the case of *Redden* v. *United States*, 5 Ct. Cust. Appls. 485 (1915), which held that unfinished scissor blades fit for no other use than completion into scissors, were classifiable as unfinished scissor blades rather than as forgings. That case was decided under the Tariff Act of 1909 which provided for

forgings, not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process, not specially provided for, and repudiates the statement that the Congress has historically wanted forgings to be classed and dealt with as forgings in preference to more specific provisions. As a matter of fact, the Tariff Act of 1930, and prior tariff acts, provided for forgings not specially provided for.

It has been held that where there is more persuasive evidence, the court recognizes that the better course rests with a reevaluation, not mere perpetuation. *William Adams, Inc.* v. *United States*, 56 Cust. Ct. 429, C.D. 2670 (1966), *Adolphe Hurst & Co., Inc.* v. *United States*, 33 CCPA 96, C.A.D. 322 (1946). This principle is applicable here.

In view of the foregoing, the 90 degree long radius ells are properly classifiable under the provision for pipe and tube fittings of steel, other, in item 610.80, TSUS, and not as forgings in item 608.25, TSUS.

Counsel for the protestant may be furnished a copy of this decision. The entry and related papers are attached.

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(C.S.D. 81-2)

Classification: Four-Wheeled Vehicle Used to Move Logs

Date: May 23, 1980
File: CLA-2: RRUCGC
061799 BB

Re Decision on application for further review of Port Huron Protest No. 3802-8-000136 concerning classification of a tree farmer pulpwood porter.

| *Entry numbers* | *Dates* | *Dates of liquidation* | *Date of protest* |
|---|---|---|---|
| 78-673161 | May 16, 1978 | Sept. 15, 1978 | Oct. 13, 1978 |
| 78-674150 | June 14, 1978 | -----do------- | Do. |
| 78-686704 | Apr. 11, 1978 | Sept. 8, 1978 | Do. |
| 78-687545 | May 3, 1978 | Sept. 15, 1978 | Do. |

*Facts.*—The subject merchandise is described as a tree farmer C5D pulpwood porter. The specification sheet indicates the pulpwood porter is a four-wheeled vehicle used to move logs. The porter features a 100-horsepower engine, four wheel drive, a four-speed transmission and a 9-foot rear deck with two pairs of sideracks and headboards. The logs are carried on the rear deck. As optional equipment the porter can be fitted with a cranab loader for the logs.

*Law and analysis.—*

*Classified under:*

*Schedule 6, Part 6, Subpart B*

| | | | |
|---|---|---|---|
| * | * | * | * |
| | | Motor vehicles specially constructed and equipped to perform special services or functions, such as, but not limited to, fire engines, mobile cranes, wreckers, concrete mixers, and mobile clinics: | |
| * | * | * | * |
| 692.16 | | Other | 5% ad val. (now 4.8% ad val.) |

*Claimed under:*

*Schedule 6, Part 6, Subpart B*

| | | | |
|---|---|---|---|
| * | * | * | * |
| | | Motor vehicles (except motorcycles) for the transport of persons or articles: Automobile trucks valued at $1,000 or more, and motor buses: | |
| * | * | * | * |
| 692.03 | | If Canadian article | Free |

*Or alternatively:*

*Schedule 6, Part 6, Subpart B*

| | | | |
|---|---|---|---|
| * | * | * | * |
| | | Tractors (except tractors in item 692.40 and except automobile truck tractors), whether or not equipped with power takeoffs, winches, or pulleys, and parts of such tractors: | |
| 692.30 | | Tractors suitable for agricultural use, (now 692.34) and parts thereof | Free |

This pulpwood porter was initially classified as a special purpose motor vehicle in item 692.16, Tariff Schedules of the United States (TSUS). After reviewing this protest we conclude that classification was not correct.

To be classified in item 692.16, TSUS, the vehicle must be equipped with a device that allows it to perform certain nontransport functions at the job site. For example, in *Border Brokerage Co., Inc.* v. *United States*, 65 Cust. Ct. 600, C.D. 4145 (1970), a mobile tree spar and yarder was classified in 692.15 (now 692.16), TSUS. The tree spar was 90-feet long and was positioned vertically at the job site via hydraulic jacks and guylines. It was used to maneuver logs on a clothesline-like device at the site. The spar was mounted on a tracked undercarriage along with a yarder frame and running boards. The yarder frame was used to hold logs when they were removed from the tree spar. The court held that the tree spar and yarder were dissimilar articles, that

only the tree spar was subject to protest, that the tree spar obviously was not a motor vehicle for the transport of articles and the protest was overruled.

In *The Carrington Co., United Geophysical Corp.* v. *United States*, 496 F. 2d 902, 61 CCPA 77, C.A.D. 1126 (1974), the court overruled the protest to classification of a mobile drill in item 692.16, TSUS. The court stated that both the transportation of special equipment to a job site and the operation of that equipment at the job site are the essential features of a vehicle classifiable in item 692.16, TSUS.

Applying these principles to the pulpwood porter, it appears that the porter is simply designed to hold logs and transport them away from the job site, like the yarder portion of the tree spar and yarder. This view is bolstered by the fact that the cranab loader for the porter is an optional item. We conclude, therefore, that the loading/unloading function is in furtherance of this vehicle's main purpose of transporting articles.

We also do not believe the porter is classifiable in item 692.30, TSUS, as a tractor suitable for agricultural use. In *United States* v. *Norman G. Jensen, Inc.* 64 CCPA 51, C.A.D. 1183, the court held that skidding logs on farms, including tree farms, could be considered an agricultural use, for tariff purposes. However, there was no question that the merchandise before the court in that case was a tractor. While the pulpwood porter may be suitable for agricultural use if used on a farm, including a tree farm, we believe it is a truck rather than a tractor.

A truck is a vehicle essentially designed to haul heavy articles while a tractor is designed to push or haul another vehicle, implement, or load. Logs are placed on the rear deck of the pulpwood porter and hauled. Therefore, we conclude it is not a tractor.

In Headquarters Ruling Letter (HRL) 053474, Customs held that an OSA 260 log forwarder was classifiable as an automobile truck in item 692.02, TSUS. In HRL 051711, Customs held that a model 667 log forwarder was classifiable in item 692.03 as a Canadian automobile truck. We conclude that the subject merchandise is indistinguishable from these log forwarders and should be classified accordingly. We note that HRL TC 434.1C, dated May 31, 1966, classified a similar piece of equipment in item 692.16, TSUS, and is in conflict with later rulings.

*Holding.*—We hold that the subject merchandise is properly classifiable under the provision for automobile trucks valued at $1,000 or more in item 692.03, TSUS, and assuming the requirements for being a Canadian article are met, can be entered free of duty. Accordingly, you are directed to allow the protest.

Because HRL TC 434.1C, dated May 31, 1966, is in conflict with this ruling, that decision is hereby revoked.

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(C.S.D. 81–3)

## Bonds: Right of Sureties to File Petitions

Date: June 4, 1980
File: BON–1–RRUCDB L 211023

*Issues.*—(1) Does a surety on a Customs bond have the right to petition for relief from a fine, penalty, or forfeiture incurred under any law administered by Customs, or from a claim for liquidated damages?

(2) If so, should the petition of the surety be accepted and denied in accordance with T.D. 78–374 (Legal Determination 3720–04)?

(3) If not, should the surety's petition be considered from the standpoint of the violation and the violator's maximum contingent liability?

(4) As a matter of general policy, should the district director routinely provide copies of the entry to the surety?

*Facts.*—There are no specific facts. The issues are raised in connection with the processing of petitions for relief from fines, penalties, forfeitures, or claims for liquidated damages.

*Law and analysis.*—A surety is one who engages to be responsible for the debt or default of another. Every suretyship contract involves three parties: (1) the one for whose account the contract is made, whose debt or default is the subject of the transaction, and who is called the principal; (2) the one to whom the debt or obligation runs, the obligee in suretyship, called the creditor; and (3) the one who agrees that the debt or obligation running from the principal to the creditor shall be performed, and who undertakes on his own part to perform it if the principal does not, called the surety.

The contract of suretyship is an undertaking to answer for the debt, default, or miscarriage of the principal by which the surety becomes bound in the same manner as, and equally with, the principal. It differs from a guaranty which is a collateral undertaking to pay in the event the debtor does not pay. So far as the creditor is concerned, in a contract of suretyship he may regard the surety as the principal debtor just as much as the one who actually is the principal. In the absence of limitations or restrictions contained in the contract, the liability of the surety is coextensive with that of the principal. 72 CJS, "Principal and Surety," section 87. A surety for the performance of a contract has a material interest in the rights and remedies to which the

creditor is entitled thereunder. Apart from statutory remedies, a surety's proper remedy at law to protect his rights ordinarily is to pay the debt and pursue the principal for reimbursement. 72 CJS, "Principal and Surety," section 286a.

The Customs Regulations, section 172.1(b) (19 CFR 172.1(b)), provide that the notice of liquidated damages incurred inform the principal and his sureties on the bond that application may be made for relief from payment of liquidated damages under section 623(c), Tariff Act of 1930, as amended (19 U.S.C. 1623(c)), or any other applicable statute authorizing the cancellation of any bond charge that may have been made against such bond.

In view of the fact that the law generally regards the surety's obligation to be the same as and coextensive with that of the principal, we interpret section 172.1 of the Customs Regulations to give both the principal and the surety the right to petition for relief.

T.D. 78–374 (Legal Determination 3720–04) relates to the filing of protests against the liquidation of entries under section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514). It is not, in our view, relevant to the issue of a surety's right to petition for relief in a penalty or liquidated damages case. A petition for relief submitted by a surety in a penalty or liquidated damages case, if proper and timely, should be accepted. It should not be accepted and denied in accordance with T.D. 78–374.

The third issue is whether the surety's petition should be considered from the standpoint of the violation and the violator's maximum contingent liability. A contingent liability is one which is not fixed and absolute, but which will become so in case of the occurrence of some future and uncertain event. The surety's liability on the bond is limited to the face amount of the bond or, in the case of certain charges or demands for liquidated damages made against a term bond, for the amount of the single entry bond that would have been taken had the transaction been covered by a single entry bond. See, for example, sections 10.39(d)(1) and 113.45, Customs Regulations (19 CFR 10.39(d)(1) and 113.45).

Since the surety on the bond stands in the same position as the principal vis-a-vis the Government and is equally liable jointly and severally with the principal, a petition for relief from a surety should be treated in exactly the same manner as a petition for relief from the principal. If the facts submitted by a surety in a petition for relief would justify cancellation of the claim or other relief if submitted by the principal, the same degree of relief that would have been accorded the principal should be extended to the surety. Similarly, if no relief would have been warranted had the petition been submitted by the principal, none should be extended to the surety.

The final issue is whether, as a matter of general policy, the district director should routinely provide copies of the entry to the surety.

We believe the surety, as a party-in-interest, is entitled to request and receive copies of the bond and entry. It is pointed out that frequently the agent of the surety is a customhouse broker who also files the entry, that the broker is in possession of a copy of the entry, and that Customs is being called upon to perform clerical functions for those who have copies of the documents at their disposal.

In our view, there is no need to routinely provide copies of the bond and entry documents to the surety, although we believe this to be a policy matter within the discretion of the district director. If, however, the surety or other party-in-interest specifically requests these documents, we believe they must be produced. In such instances, we see no objection to billing the requester for the services performed at the prevailing rates.

*Holding.*—(1) The surety on a Customs bond has the right to petition for relief from any fine, penalty, forfeiture, or claim for liquidated damages incurred as a result of a breach of the bond.

(2) The petition of the surety should be accepted if proper and timely. It should not be denied in accordance with Treasury Decision 78–374 (Legal Determination 3720–04).

(3) The petition of a surety should be considered in the same manner as the petition of a principal.

(4) A surety who is a party-in-interest may be furnished with copies of the entry upon request and at the prevailing charge for providing such service. It is not believed necessary to routinely provide copies of the entry to the surety since the notice of penalty or liquidated damages incurred describes the violation. However, this is a matter within the discretion of the district director.

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(C.S.D. 81–4)

## In-Bond Carriers and Cartmen: Persons Eligible to Move Merchandise Within Port Limits

Date: June 4, 1980
File: BON–1–RRUCDB L 211288

*Issue.*—May in-bond merchandise be moved within port limits from the place or pier of unlading of the importing carrier to the place or pier where the merchandise will be loaded on the exporting vessel or conveyance by other than a licensed customhouse cartman?

*Facts.*—A customhouse broker files an immediate exportation entry,

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supported by a bond for exportation or transportation or for transportation and exportation, Customs Form (CF) 7559, covering merchandise that must be moved within port limits from the place or pier of unloading of the importing carrier to the place or pier where the merchandise will be loaded on the exporting vessel or conveyance.

The customhouse broker wishes to move the merchandise by other than a licensed customhouse cartman and inserts a notation on CF 7512, transportation entry and manifest of goods, assuming full responsibility under the conditions of the bond on Customs Form 7559, for such liquidated damages and loss of revenue as may be incurred by failure to complete such transportation to the satisfaction of the district director.

*Law and analysis.*—Section 1565, title 19, United States Code, provides that:

> The cartage of merchandise entered for warehouse shall be done by cartmen to be appointed and licensed by the appropriate customs officer and who shall give a bond, in a penal sum to be fixed by such customs officer, for the protection of the Government against any loss of, or damage to, such merchandise while being so carted. The cartage of merchandise designated for examination at the appraiser's stores and of merchandise taken into custody by the customs officer as unclaimed shall be performed by such persons as may be designated, under contract or otherwise, by the Secretary of the Treasury, and under such regulations for the protection of the owners thereof and of the revenue as the Secretary of the Treasury shall prescribe.

Part 125, Customs Regulations (19 CFR 125), is concerned with the cartage and lighterage of merchandise and the duties and liabilities of cartmen and lightermen. Part 112, Customs Regulations (19 CFR 112), provides for the licensing of cartmen and lightermen.

A cartman is defined in section 112.1(b), Customs Regulations (19 CFR 112.1(b)), as one who undertakes to transport goods or merchandise within the limits of the port. Section 125.1, Customs Regulations (19 CFR 125.1), provides for two classes of cartage: (a) government cartage, which *must* be done by a licensed customhouse cartman and, (b) importers' cartage, which *may* be done by any licensed customhouse cartman. [Italic added.] Section 125.21, Customs Regulations, relating to cartage other than for examination, provides in part that any licensed cartman, *including an owner licensed to cart his own imported merchandise*, may transfer merchandise from the importing vessel or other conveyance to bonded warehouse, *from one vessel or conveyance to another*, from one bonded warehouse to another, from the public stores to a bonded warehouse, from warehouse for transportation or for exportation, and from an internal revenue warehouse for exportation under the internal revenue laws without pay-

ment of tax. [Italic added.] Section 125.23, Customs Regulations (19 CFR 125.23), provides in part that if an importer does not cart his merchandise (which, read with section 125.21, implies an importer licensed to cart his own imported merchandise) or designate a licensed cartman for the purpose, it shall be carted by a public store cartman authorized by contract or designated by the district director for that purpose.

We interpret the Customs Regulations to require that merchandise moved within port limits from one vessel or conveyance to another be moved by an importer licensed to cart his own imported merchandise, by a licensed customhouse cartman, or by an authorized public store cartman.

In view of our interpretation of the Customs Regulations, we do not address the question as to the sufficiency of the bond on Customs Form 7559 to cover such a movement.

*Holding.*—In-bond merchandise may be moved within port limits from one vessel or conveyance to another (except as provided for in section 18.3 and 125.12, Customs Regulations (19 CFR 18.3 and 125.12)), only by an importer licensed to cart his own merchandise, a licensed customhouse cartman, or an authorized public store cartman.

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(C.S.D. 81-5)

## TIB: Eligibility of Unconditionally Duty-Free Merchandise

Date: June 4, 1980
File: CON-1-RRUCDB WR 211680

*Issues.*—1. Whether unconditionally free merchandise may be entered for temporary importation under bond?

2. If unconditionally free merchandise is entered for temporary importation under bond, how is the amount of the bond determined?

*Facts.*—The inquirer raised the issues as a hypothetical problem.

*Law and analysis.*—Headnote 1(a), part 5C, schedule 8, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), is the statutory basis for temporary importation of merchandise under bond. Headnote 1, schedule 8, TSUS (19 U.S.C. 1202), provides thai any article which is described in any provision of schedule 8 is classifiable in that provision if the applicable statutory requirements and regulations are met. That is, an article meeting the requirements of a schedule 8 provision is entitled to be entered under that provision notwithstanding any other provision in the first seven schedules. Tariff Classification Study, schedule 8, page 2, (November 15, 1960).

There is nothing in the Customs Regulations which specifically prohibits a temporary importation under bond entry of unconditionally duty-free merchandise.

There is a bond problem. Under section 10.31(f), Customs Regulations (19 CFR 10.31(f)), the bond used to secure a temporary importation entry is based on the amount of duty that would accrue had the imported merchandise been entered for consumption. That same basis for computing the amount of a temporary importation bond is set forth in section 113.14(K)(1), Customs Regulations (19 CFR 113.14-(K)(1)).

*Holdings.*—1. Unconditionally duty-free merchandise is entitled to be temporarily imported under bond.

2. Sections 10.31(f) and 113.14(K)(1), Customs Regulations (19 CFR 10.31(f) and 113.14(K)(1)) apply to dutiable and conditionally free merchandise temporarily imported under bond. A bond used to secure the temporary importation of unconditionally duty-free merchandise is to be set at an amount, in the opinion of the district director, that will be sufficient to guarantee compliance with the requirements of the statute and regulations.

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(C.S.D. 81–6)

## TIB: Acceptability of Drawback Procedures as Proof of Exportation

Date: June 4, 1980
File: CON–9–RRUCDB MM
211665

*Issues.*—(1) Whether documentation accepted as proof of exportation for drawback claims is also acceptable as proof of exportation for canceling temporary importation bonds.

(2) Whether an affidavit from the forwarder at a border port may be accepted in lieu of a bill of lading when no bill of lading has been issued to cover the exportation.

*Facts.*—This inquiry involves three temporary importation entries and the documentation submitted to establish proof of exportation. With regard to the first two entries, an uncertified notice of exportation supported by a signed ocean bill of lading was filed to establish exportation but was rejected at the Customs port because the notice was not certified or dated by Customs. An appeal was denied by the District Director on the grounds that provisions for temporary importations and drawback are not interchangeable.

The third entry involved merchandise which was exported to Mexico and for which an export bill of lading was not issued. An affidavit from the forwarder at the border port was furnished with the export documentation as proof of exportation but was rejected by Customs.

The inquirer is relying on C.I.E. 1414/59, dated October 12, 1959, as authority for acceptance of the drawback export procedure in connection with temporary importation entries, and T.D. 51271 as authority to accept the forwarder's affidavit when no bill of lading can be obtained.

*Law and analysis.*—The inclusion of processes which result in articles manufactured or produced as provided by the May 18, 1958, amendment to section 308(1), Tariff Act of 1930, as amended, now item 864.05, Tariff Schedules of the United States, posed problems for both the manufacturer and Customs with respect to physical examination of the finished articles upon exportation. In answer to this, headquarters set forth in C.I.E. 1414/59 entry and export procedures for use in appropriate cases involving merchandise entered for processing under section 308(1).

In issuing C.I.E. 1414/59 headquarters decided that if the procedure used in drawback was adequate to support disbursement of millions of dollars of drawback payments it was also adequate to support cancellation of temporary importation bonds.

C.I.E. 1414/59 permits the District Director to examine articles exported to cancel temporary importation bonds to the extent necessary to protect the revenue. In these cases appropriate instructions must be given to the importer at the time of importation.

With respect to the second issue, since it has been determined that drawback procedures for exportation can be appropriately applied to temporary importation procedures for exportation purposes, the use of an affidavit as set forth in T D. 51271 may also be followed in establishing proof of exportation to cancel temporary importation bonds. Headquarters has also authorized the acceptance of affidavits in lieu of a bill of lading when no such documentation can be obtained in accordance with section 22.29(d) of the regulations dealing with the exportation of rejected merchandise.

A proposal to revise part 10 of the Customs Regulations to incorporate the substance of C.I.E. 1414/59, T.D. 51271, and this ruling is being prepared.

*Holding.*—(1) The documentation provided in section 22.7 of the Customs Regulations providing evidence of exportation for drawback claims may also be accepted as proof of exportation for purposes of canceling temporary importation bonds.

(2) A forwarder's affidavit at a border port may be accepted in lieu of a bill of lading, when no bill of lading is issued, in accordance with the provisions set forth in T.D. 51271.

*Effect on other rulings.*—Affirms C.I.E. 1414/59 and T.D. 51271.

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(C.S.D. 81–7)

## Drawback: Recasting of Metal in Gold Chains into Ingots; Manufacture or Production under 19 U.S.C. 1313(a)

Date: June 6, 1980
File: DRA–1–RRUCDB MM
211545

*Issue.*—Whether the melting of gold chains and subsequent casting of the metal into limited edition gold collectors' ingots constitutes a manufacture or production for the purposes of title 19, United States Code, section 1313(a).

*Facts.*—Gold chains which were imported for sale as jewelry were found to be unmarketable. The importer proposes to melt the gold chains down and cast gold ingots in order to participate in the market for collector-size gold ingots. After the ingots are removed from the mold they will be stamped with the importer's logo, the quality and weight, and serialized for identification as limited editions.

*Law and analysis.*—Title 19, United States Code, section 1313(a), provides for drawback upon the exportation of articles which have been manufactured or produced in the United States with the use of imported merchandise. A manufacture or production has been defined as a process which changes or transforms an article into a new and different article having a distinctive name, character or use.

Headquarters has previously allowed drawback on articles manufactured with the use of material which was recovered from unmarketable products. One such case, published as T.D. 55599(5), concerned orisul used in the manufacture of tablets which were found not to be in compliance with the requirements of the Food and Drug Administration. Headquarters determined that the orisul could be recovered and reused in the manufacture of orisul triturate mixture for exportation with the benefit of drawback.

In the present case, the gold content of the chains would be reused to produce collectors' ingots. Such a procedure is considered to be an upgrading of the imported merchandise since it advances the value of the merchandise.

*Holding.*—The melting of gold chains and subsequent casting of the metal into limited edition gold collectors' ingots constitutes a manu-

facture or production under title 19, United States Code, section 1313(a), upon compliance with the applicable law and regulations.

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(C.S.D. 81-8)

## Foreign Trade Zones: Change in Status of Merchandise; Eligibility for Entry Into Customs Bonded Warehouse

Date: June 9, 1980
File: FOR-1-RRUCDB L 211198

*Issues.*—1. May foreign crude oil admitted into a foreign-trade zone (FTZ) for manufacture into petroleum products be changed from the status of nonprivileged foreign merchandise to privileged foreign merchandise?

2. May the manufactured petroleum products with the status of privileged foreign merchandise be entered into a Customs bonded warehouse and subsequently withdrawn for use in supplying bonded aviation or marine fuel to aircraft or ships departing on international flights or voyages?

*Facts.*—A domestic company now manufactures petroleum products from foreign source crude oil in an FTZ. The finished products are nonprivileged foreign merchandise. A portion of the finished products is imported into Customs territory, a portion is exported to foreign countries, and a portion is exported as bonded fuel for use by aircraft and ships in international traffic.

It is proposed to change that status of the foreign crude oil admitted to the FTZ from nonprivileged foreign merchandise to privileged foreign merchandise. That portion of the finished petroleum product, with the status of privileged foreign merchandise, that is to be sold as bonded aviation or marine fuel for use in international traffic, would be transferred from the FTZ and entered into a Customs bonded warehouse. The product transferred from the FTZ to a Customs bonded warehouse would be used solely as bonded fuel in international traffic and would not be entered into the commerce of the United States.

*Law and analysis.*—The first proviso of section 81c, Foreign-Trade Zones Act of 1934 (19 U.S.C. 81c), provides in part:

> That whenever the privilege shall be requested and there has been no manipulation or manufacture effecting a change in tariff classification, the appropriate Customs officer shall take under supervision any lot or part of a lot of foreign merchandise in a zone, cause it to be appraised and taxes determined and duties liquidated thereon. Merchandise so taken under supervision may be stored, manipulated, or manufactured under the supervision

> and regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not, may, under regulations prescribed by the Secretary of the Treasury, and whether mixed or manufactured with domestic merchandise or not may, under regulations prescribed by the Secretary of the Treasury, be exported or destroyed, or may be sent into Customs territory upon the payment of such liquidated duties and determined taxes thereon.

Nonprivileged foreign merchandise is defined in part in section 146.23(a), Customs Regulations (19 CFR 146.23(a)), as foreign merchandise properly in a zone which does not have the status of privileged foreign merchandise or of zone-restricted merchandise. Privileged foreign merchandise, as defined in section 146.21(a), Customs Regulations, is foreign merchandise which has not been manipulated or manufactured so as to effect a change in tariff classification and upon proper application to the district director has been given status as privileged foreign merchandise.

Assuming that the application for privileged status is proper and is made prior to transfer of the crude oil to Customs territory and prior to a manipulation or manufacture which would effect a change in its tariff classification, we see no objection to approving an application to change the status of the foreign crude oil from nonprivileged foreign to privileged foreign.

The second issue is whether that portion of the finished petroleum product with privileged foreign status that is destined for use as bonded aviation or marine fuel for aircraft or ships departing in international traffic may be transferred from the FTZ and entered into a Customs bonded warehouse.

Section 309, Tariff Act of 1930 (19 U.S.C. 1309), provides in part that supplies for certain vessels and aircraft may be withdrawn from any Customs bonded warehouse or from a foreign-trade zone free of duty and internal revenue tax.

Section 557, Tariff Act of 1930, as amended (19 U.S.C. 1557), provides in part that any merchandise subject to duty, with certain exceptions not relevant here, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer, or consignee.

Section 146.48(c), Customs Regulations (19 CFR 146.48(c)), provides that articles may be transferred from a zone for entry for consumption or, *except in the case of articles composed of or derived in part from privileged foreign merchandise*, for entry for warehousing subject to the treatment specified in section 146.48(e). [Italic added.] Section 146.48(e) relates to appraisement and tariff classification.

Under the Customs Regulations, therefore, privileged foreign merchandise may not be transferred from an FTZ to a Customs bonded

warehouse. This regulation appears to be based upon the first proviso of 19 U.S.C. 81c, supra, which states in part that foreign merchandise may be "sent into Customs territory upon the *payment* of such liquidated duties and determined taxes thereon." [Italic added.] In other words, payment of duties may not be delayed by any mechanism, including deposit of merchandise in a Customs bonded warehouse.

In addition, we perceive possible administrative difficulties in two other areas if privileged foreign merchandise is entered for warehouse. Section 557, Tariff Act of 1930, as amended (19 U.S.C. 1557), limits the warehousing period to a time not exceeding 5 years from the date of importation. Date of importation would be the date of admission into the FTZ and not the date of entry for warehouse and would require notation of this fact. Second, should there be manipulation in warehouse of privileged foreign merchandise entered from an FTZ, resulting in a change in value or classification, there may be a conflict in determining the applicable value and rate of duty.

*Holding.*—1. Foreign crude oil admitted into an FTZ for manufacture into petroleum products may be changed from the status of nonprivileged foreign to privileged foreign merchandise provided the application for privileged foreign status is made prior to transfer to Customs territory and prior to a manipulation or manufacture which changes its tariff classification.

2. Privileged foreign merchandise may not be transferred from an FTZ and entered into a Customs bonded warehouse for subsequent duty and tax-free withdrawal as vessel supplies under 19 U.S.C. 1309, or for any other purpose. The Customs Regulations, in section 146.48(c), prohibit the entry for warehouse of articles composed of or derived in part from privileged foreign merchandise, reflecting the first proviso of 19 U.S.C. 81c, that privileged foreign merchandise may be sent into Customs territory upon the payment of liquidated duties and determined taxes.

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(C.S.D. 81-9)

## U.S. Value: Deductibility of Certain Charges Where Principal Market Is a Border Point

Date: June 24, 1980
File: CLA-2: RRUCV JV 065058

To: District Director of Customs, San Diego, Calif.
From: Director, Classification and Value Division.
Subject: Internal Advice Request No. 239/79.

This request concerns the appraisement of certain fresh asparagus imported from Mexico through the Port of Calexico, the principal

335-084 O - 81 - 4

market. The basis of appraisement is conceded to be U.S. value, section 402(c), Tariff Act of 1930 as amended.

*Issues.*—(1) Whether usual wholesale quantity should be taken into account in the calculation of the appraised value of the merchandise?

(2) Whether certain charges for Customs brokerage fees and freight from the border to the importer's premises in Calexico constitute allowable deductions under section 402(c)(1)(2)?

*Background.*—As you know, the principal issue here, that of usual wholesale quantity, is currently the subject of a penalty action at headquarters under District Case No. 75-2503-10423, involving the same importer. The penalty case, however, covers entries of fresh asparagus for the 1973-74 harvest seasons, while the internal advice covers entries in 1975 to date. We note that the exhibits and corresponding documents filed with this request refer solely to importations and sales made in 1973-74. According to counsel for the importer, sales information for 1975 and beyond has not been compiled. Without such information, we are unable to comment at this time on whether or not a usual wholesale quantity exists for those years. Counsel has advised us that it will take some time to compile the required data and, if necessary, will file a separate request for internal advice.

We understand that the appraising officer in Calexico is currently dutying freight charges from the border crossing in the principal market in Calexico to the importer's warehouse, also located in the principal market. It is counsel's postion, citing the case of *E. H. Corrigan* v. *United States*, R.D. 8278 (1954), that such charges are properly deductible from the U.S. selling price of merchandise, inasmuch as they represent the usual costs of transporting the goods from place of shipment to place of delivery.

*Law and analysis.*—U.S. value is defined in section 402(c) of the Tariff Act of 1930, as amended, as follows:

> (c) For the purposes of this section, the U.S. value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal market of the United States for domestic consumption, packed ready for delivery, in the usual wholesale quantities and in the ordinary course of trade, with allowances made for—
>
> (1) any commission usually paid or agreed to be paid, or the addition for profit and general expenses usually made, in connection with sales in such market of imported merchandise of the same class or kind as the merchandise undergoing appraisement;
>
> (2) the usual costs of transportation and insurance and other usual expenses incurred with respect to such or similar merchandise from the place of shipment to the place of

delivery, not including any expense provided for in subdivision (1) of this subsection; * * *

R.D. 8278, supra, involved merchandise which was exported from Mexico through the Port of Laredo and proceeded overland to the principal market in New York City. Freight charges to the purshaser's place of business in or near New York City were allowed. Upon rehearing (R.D. 8295), however, the court clarified its position by adding that the "item deductible should be the cost of transport from Laredo to the terminal in New York, the principal market of the merchandise." This position is in accord with prior court rulings where freight charges were allowed only to the pier or central freight area in the principal market. See, for example, *Star Import Company* v. *United States*, R.D. 2370 (1932).

In the case of trucked merchandise, there are generally no central trucking depots. The merchandise is usually laden on through bills of lading and sent directly to an importer's premises. Nevertheless, for purposes of uniformity, some central point must be chosen as a place of delivery of such merchandise in the principal market. The court, in *United States* v. *E. H. Corrigan*, A.R.D. 67, addresses this point. "It is clear," the court stated, "that the intendment of the U.S. value statute is to find a value for merchandise in the principal market of the United States, less the duties, costs, expenses, and charges incurred in bringing it to that U.S. principal market from the foreign market.* * * There is nothing in the context of the statute which indicates that the place of delivery was to be a different place in each case.* * * Such a construction would create multiple values for such merchandise at the same time, and be inharmonious with the obvious purpose of the statute, which is to fix a value for merchandise at a definite time and in a definite place."

We consider the definite place in a situation where the principal market is located at a border point and where the merchandise is not trucked to a central depot to be the actual border crossing, analogous to the pier or railroad station in the principal market referred to in R.D. 2370, supra. Freight beyond that point would not be part of the allowable freight from the place of shipment to the place of delivery, and would be dutiable. T.D. 41318 supports this view and refers specifically to merchandise similar to that claimed by counsel. The court in that case disallowed items of teaming from the terminal to the warehouse as constituting expenses subsequent to the arrival of the merchandise at the place of delivery in the principal market. See also T.D. 41481.

It is our opinion, therefore, in cases where the principal market is located at a border point, the freight charges from the border to

the importer's premises or warehouse in the principal market are nonallowable charges occuring after the merchandise has been delivered to the principal market.

Regarding the deductibility of Customs brokerage charges, the courts appear to make a distinction between those charges incurred when the principal market is located at a border point as opposed to being located inland. In R.D. 8278, supra, and R.D. 8355 (*E. H. Corrigan* v. *United States* (1954)), the merchandise entered the United States at the Port of Laredo and proceeded to the principal market in New York City. Customs entry charges in R.D. 8355 were considered an allowable deduction in that they constituted usual expenses from the place of shipment to the place of delivery. The brokerage charges in R.D. 8278, however, were disallowed since they were charges to spice brokers rather than to Customs brokers, and thus, were not considered a usual expense of transporting the merchandise from place of shipment to place of delivery.

The case of *Hensel, Bruckman and Lohrbacher, Inc.* v. *United States*, R.D. 4209 (1938), on the other hand, involved merchandise imported from Germany to New York City, the principal market. The court in that case disallowed Customs brokerage fees as deductible since they occured after delivery of the merchandise at the dock in the principal market. Such charges, therefore, become a general expense of doing business rather than a usual expense from place of shipment to place of delivery, and would be allowable only if included in the general expense provision in section 402(c)(1). In this connection, see *United States* v. *Dalminter, Inc. & R.W. Smith*, A.R.D. 135 (1961).

It is our opinion that, in the instant case, the charge for Customs brokerage is not allowable as part of the usual cost of transportation in 402(c)(2) since it occurs after delivery in the principal market, nor can it be part of the general expense allowance in 402(c)(1), inasmuch as the merchandise is consigned and an allowance for commission has already been taken.

*Holding.*—In cases where the principal market is located at a border point, the freight charges from the border to the importer's premises or warehouse in the principal market are not deductible from the U.S. selling price of the merchandise undergoing appraisement.

A Customs brokerage fee which is incurred after delivery of the merchandise in the principal market is not allowable as part of the usual cost of transportation in 402(c)(2), unless included in the general expense provision in section 402(c)(1). However, where the merchandise is consigned and an allowance for commission under 402(c)(1) has already been taken, the brokerage fee is not deductible under that subsection.

(C.S.D. 81–10)

## Valuation: Determining Country of Exportation

Date: June 24, 1980
File: CLA–2:RRUCV
061584 BS

Re Protest No. 3004–8–000111; Application for Further Review

DISTRICT DIRECTOR OF CUSTOMS,
*Seattle, Wash.*

DEAR SIR: The issue involved in the above-captioned matter is whether East Germany or Canada is the country of exportation. The parties are in agreement that statutory export value, section 402(b), Tariff Act of 1930, as amended, is the proper basis of appraisement.

The subject merchandise is a stereometrograph manufactured in East Germany and originally exported from that country and entered by (X corporation) through New York in February 1970 under a temporary importation bond. After the instrument was shown at exhibition, it was placed in storage in the United States.

In July 1972, while at a convention in Canada, a representative of (X) entered into an oral agreement with (an American corporation, A) for the sale of a stereometrograph. This agreement was confirmed in writing by letter dated August 7, 1972. The price to be paid for the instrument was $45,000 plus $9,000 in financing charges.

On September 20, 1972, the merchandise was shipped to (a distributor in Canada, Y), apparently the exclusive distributor in that country of instruments made by the East German manufacturer (Z). On October 16, 1972, while the article was still under bond, it was entered at the port of Blaine, Wash., for consignment to —.

In establishing statutory export value, the price at which such or similar merchandise is freely sold, or offered for sale, in the principal markets of the country of exportation must be ascertained.

The appraising officer was of the opinion that Canada was the country of exportation and therefore utilized the purchase price to (A), $45,000, as representing statutory export value. The supervisory import specialist at New York concurs, and is of the opinion that a contingency of diversion existed when the merchandise was shipped to Canada and could have been sold to any purchaser in that country.

On the other hand, the protestant contends that East Germany and not Canada is the country of exportation for statutory export value purposes, and that the freely sold or offered price is established by the price paid by (X) to (Z) ($17,165) which is also reflected in a published price list. Protestant argues that an enforceable agreement between (X) and the U.S. consignee had been entered into prior to exportation

of the instrument, and that the subject of the agreement was in fact the instrument exported by (X); that (X) exported the machine to Canada merely to satisfy its obligation under the temporary importation bond; and that under applicable law and regulation, there was no bond fide exportation from the United States to Canada since the necessary intent to unite the article to the mass of things belonging to some foreign country did not exist.

Section 113.55(a) of the Customs Regulations defines the term "exportation" for purposes of cancelling an exportation bond as "* * * a severence of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country. The shipment of merchandise abroad with the intention of returning it to the United States with a design to circumvent provisions of restriction or limitation in the tariff laws or to secure a benefit accruing to imported merchandise is not an exportation." For recent court approval of their definition in an appraisement context, see *National Sugar Refining Company* v. *United States*, C.D. 4849, March 27, 1980.

The record establishes that the subject instrument was exported to Canada after having been sold to a U.S. company only to satisfy the requirements under the temporary importation bond, and that there was no intention to unite the article with the mass of things in Canada. Therefore, there was no exportation from Canada as that term is defined in section 113.55(a). The regulation further provides that "Merchandise of foreign origin returned from abroad under these circumstances is dutiable according to its nature, weight, and value at the time of its original arrival in this country."

Under the circumstances, East Germany is the country of exportation for purposes of section 402(b), Tariff Act of 1930, as amended, and the price paid by (X) to (Z), $17,165, should be used as the appraised value.

Accordingly, you are directed to allow the protest in full.

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(C.S.D. 81-11)

Export Value: Whether a Trigger Price May Support Export Value Under Section 402(b), Tariff Act of 1930, as Amended

Date: June 24, 1980
File: CLA-2:RRUCV
065077 TLL

AREA DIRECTOR, NEW YORK SEAPORT,
*New York, N.Y.*

DEAR SIR: This is in reply to an application for further review of New York protest 1001-9-012087, which was timely filed.

*Issue.*—Whether the use of a trigger price was a permissible method of establishing export value.

*Facts.*—The instant protest covers certain steel exported on June 24, 1978, and ordered on March 8, 1978. On May 15, 1978, a new set of trigger prices was announced 45 days prior to their effective date of July 1, 1978, for shipments after such date. Based on information received from various sellers and importers of steel, orders began to be submitted on or after May 15, 1978, which were in line with the trigger prices announced.

Protestant claims that the invoice value, less certain nondutiable charges, represents statutory export value. It is further stated that the importer is related to, but acts independent of, the seller and that the freely offered price is that price that appears on the commercial invoice. Protestant was unable to submit any evidence supporting this claim. The merchandise covered by this protest is galvanized steel coils which is not listed on the final list, T.D. 54521.

Your office points out that it has reviewed the value records for the time and product involved here. From CF 6431's sent to New York for value and classification, the following is noted: the first report was on a shipment to Hartford, Conn. This is identical merchandise as to what is being protested. The CF 6431 value report shows that the merchandise was pruchased on June 20, 1978, and exported on August 16, 1978. The prices reported are higher than those on the protested invoice. Although the sizes are different, your conclusion is that the prices were increased by the seller prior to the date of export of the merchandise under protest. Another CF 6431 on similar merchandise sold by another Korean exporter, ordered on June 29, 1978, and exported on July 17, 1978, indicates that this seller was using the May 15, 1978, trigger prices. Therefore, your office concluded that the merchandise was being ordered at trigger prices with a deduction granted for certain nondutiable charges.

*Law and analysis.*—Section 402(b) of the Tariff Act of 1930, as amended, provides:

> (b) Export value—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and other expenses incidental to placing the merchandise in condition packed ready for shipment to the United States.

Essentially, section 402(b) requires us to find a "freely sold, or in the absence of sales, offered for sale" price in the principal markets of country of exportation for exportation to the United States at the

time of exportation. Thus, to the extent merchandise subject to trigger pricing represents such a price, it is possible to find export value. Of course, whether or not export value would exist in a particular set of circumstances is a question of fact which must be determined on a case by case basis. On the basis of the facts established here, the trigger price figures used represent export value. The fact that the prices were for future delivery is no bar to the finding of export value. Therefore, you are directed to deny the protest.

*Holding.*—Export value at the trigger price figure is the correct appraisement.

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(C.S.D. 81–12)

Classification: Cast-Iron Replicas of Early American Banks; Suitability for Household Use

Date: June 25, 1980
File: CLA–2:RRUCGC
062709 jh

To: Area Director of Customs, New York, N.Y.

From: Director, Classification and Value Division.

Subject: Reconsideration on the classification of cast-iron mechanical banks.

In your memorandum of September 11, 1979 (CLA–2–S:C:DV/CST 53/208), you request that we reconsider our decision of July 15, 1977 (046524), in which we held that certain cast-iron banks were classifiable under the provision for articles not specially provided for, of a type for household use, of iron or steel, cast, coated, in item 653.85, Tariff Schedules of the United States (TSUS).

The merchandise in question consists of replicas of early American cast-iron banks. Each bank incorporates a mechanical movement which deposits or attempts to deposit a coin in the interior of the bank.

It is your opinion that item 653.85, TSUS, does not apply to these banks in view of C.A.D. 1149. In *The United States* v. *Parksmith Corp.*, 62 CCPA 76, C.A.D. 1149 (1975), the court held that small replicas of the Empire State Building and the Statue of Liberty were primarily decorative articles because they lacked any utilitarian purpose. Therefore, they were not the type of article suitable for household use. Your position is also based on the fact that attempts to deposit coins would very often be unsuccessful when using the mechanical feature. The interior of the articles is not smooth and straight and there is the

possibility that coins being deposited could get lodged in inaccessible areas.

It is our view that these banks are primarily decorative or collector's articles and would only rarely be used for utilitarian purposes. Accordingly, following the principle of C.A.D. 1149, these banks are classifiable under the provision for articles of iron or steel, not coated or plated with precious metal, cast-iron articles, not alloyed, not malleable, in item 657.09, TSUS, and entitled to duty-free entry. The decision letter of July 15, 1977 (046524), is hereby revoked.

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(C.S.D. 81–13)

Classification: Eo Nomine Tariff Designation for Drapery Tieback

Date: July 11, 1980
File: CLA-2:RRUCGC
061861 PR

DISTRICT DIRECTOR OF CUSTOMS,
*El Paso, Tex.*

DEAR SIR: This is in reply to your request for internal advice, No. 256/79, concerning the tariff classification of drapery tiebacks.

*Facts.*—Two samples were received. One sample is an all textile tassel made of chainnette yarns of manmade fibers and apparently has no relationship to the instant inquiry. The other sample is a completed drapery tieback. It consists of a 2-yard length of double-ply cord of manmade fibers, both ends of which terminate in a single, rather elaborate tassel. The tassel is formed by a textile covered plastic barrel and 3-inch manmade fiber yarns which form a fringe. Prior to the attachment of the cord ends to the tassel, the cord was inserted through a plastic barrel-shaped textile covered cylinder which acts as a sleeve to adjust the tieback to the individual drape. The initiator of the internal advice request advises that the merchandise is also imported without the adjustment sleeve.

*Issue.*—The issue presented is whether the sample drapery tieback is classifiable under the provision for cords and tassels, in item 385.70, Tariff Schedules of the United States (TSUS), or under the provision for other ornamented furnishings, of manmade fibers in item 365.86, TSUS.

*Law and analysis.*—The Customs has twice previously ruled on virtually identical merchandise—in headquarters ruling letter 059300, dated September 21, 1978, and in internal advice request No. 192/78, 055485, dated March 15, 1979. In both instances, the Customs Service

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ruled that the drapery tiebacks were properly classifiable under the provisions for ornamented furnishings. The latter ruling contained an extensive discussion on why the instant merchandise is classifiable as a furnishing and not as an article not specially provided for. There was no indication in either ruling that the provision for cords and tassels was even considered.

If the provision for cords and tassels, item 385.70, TSUS, is determined to be applicable to the instant merchandise, then the merchandise would be classifiable in item 385.70, TSUS, since that provision is more specific than a competing provision for ornamented furnishings. See general headnote 10(c), TSUS.

The instant merchandise is made up primarily of a cord and a tassel. However, since both ends of the cord terminate in the single tassel and an adjustment sleeve has been added, the article is a completed drapery tieback. As imported, its identity is fixed with absolute certainty. No further manufacturing operations will take place. The question then derives as to whether the provision for cords and tassels was intended to cover completed articles of commerce.

The legislative history of item 385.70, TSUS, has been extensively researched by this office, going back to the introduction of the words "cords and tassels" in the Tariff Act of March 22, 1867. No indication of what Congress intended to include within that terminology has been discovered. However, the U.S. Court of Customs Appeals, in *Willenborg & Co.* v. *United States*, 6 Ct. Cust. Appls. 451, T.D. 35985 (1915), clearly stated its opinion on what type of merchandise was intended to be included under the tariff provision for cords and tassels:

> Illustrative exhibits have been offered in the case of what constitutes cords and tassels. They are articles approximately a yard in length with a tassel on each end, the major portion thereof plainly being a silk cord. They are articles of utility as well as adornment and are used on or attached to wearing apparel for various purposes. While these may respond to some other tariff nomenclature such as belts and beltings, they are, nevertheless, plainly within the terms cords and tassels. (at pg. 457)

It is noteworthy that although there have been numerous statutory tariff changes since *Willenborg*, there has been no manifestation by Congress of its displeasure or disagreement with the court's opinion of what constitutes cords and tassels.

Two general rules of statutory construction are pertinent. The first is that an eo nomine designation without terms of limitation includes all forms of the article. *Sears, Roebuck & Co.* v. *United States*, 46 CCPA 79, C.A.D. 701 (1959); *Hoyt, Shepton & Sciaroni* v. *United States*, 52 CCPA 101, C.A.D. 865 (1965). Clearly, the instant merchandise is made up of a cord and a tassel. The addition of the adjustment

sleeve does not change either the nature or function of the article. The sleeve merely serves to enhance and simplify the article's use as a tieback. The merchandise with the sleeve has the same function and use as the same merchandise without the sleeve. Accordingly, the addition of the adjustment sleeve does not make the merchandise "more than" a cord and a tassel. *United States* v. *Oxford International Corp.*, 62 CCPA 102, C.A.D. 1154 (1975); *Texas Instruments, Inc.* v. *United States*, — Cust. Ct. —, C.D. 4810 (1979).

Second, when a tariff term has been judicially interpreted and is thereafter reenacted in substantially the same language, the rule is that the term, when used in a later statute, will be given the same intrepretation unless a legislative intent to the contrary clearly appears. *W. E. Sellers* v. *The Cronite Co., Inc.* 45 CCPA 27, C.A.D. 668 (1957); *August Benthamp* v. *United States*, 40 CCPA 70, C.A.D. 500 (1952).

*Holding.*—Based on the above, the Customs Service concludes that the tariff term "cords and tassels" includes finished articles of commerce and, therefore, the subject merchandise is properly classifiable in item 385.70, TSUS. If an established and uniform practice exists to the contrary, such practice is clearly in conflict with *Willenborg*, supra, and should not be followed.

*Effect on other rulings.*—In view of the holding in this ruling, headquarters rulings 059300, dated September 21, 1978, and 055485, dated March 5, 1979, are, pursuant to section 177.9(d)(1), Customs Regulations, hereby modified to reflect that merchandise which was the subject of each of those rulings is properly classifiable in item 385.70, TSUS.

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(C.S.D. 81-14)

## Generalized System of Preferences: Effect of Improperly Completed Form A

Date: July 14, 1980
File: ENT-1-01:RRUEE
712934 MK

Re Application for further review of protest, No. 1001-9-009974, dated October 10, 1974

REGIONAL COMMISSIONER OF CUSTOMS,
*New York, N.Y.*

DEAR SIR: This decision concerns your classification, liquidation, and assessment of duty on plastic trees, decorations and balls. The importer alleged that they should have been classified and liquidated

as free, under the Generalized System of Preferences (GSP). (On Jan. 18, 1980, the importer's attorneys withdrew that part of the protest covering the plastic decorations and balls).

The entry was liquidated on July 13, 1979. The Certificate of Origin, form A, originally filed with the entry, was rejected because the Christmas decoration set listed on the form showed "Y 65 percent" and did not contain a breakout showing all the elements of the set. (The Y category indicated that the imported articles contained parts not produced, or substantially transformed, in the beneficiary developing country).

On December 19, 1978, an amended form A was issued, showing a breakdown for the elements in the set, but still showing the legend "Y 65 percent" for all 5 elements of the set. Customs questioned this, because it was highly unlikely that each element would contain 65 percent of domestic materials and labor.

Thereafter, in correspondence between the importer's attorneys and the parties concerned, it was found that all parts of the sets were wholly produced in Taiwan, and the forms A should therefore have listed a P instead of a Y.

On September 20, 1979, the shipper advised the importer that the government of the beneficiary developing country would not issue corrected forms A beyond 6 months from the original shipping dates. They also stated that the designation Y was caused by an erroneous interpretation of the country of origin criterion, and that the legend P should have been used to indicate that the articles were entirely produced in the beneficiary developing country.

Although the errors in the forms A were evidently caused by a misunderstanding as to how they should have been completed, we find no legal basis for accepting the shipper's statements that no new certificates of origin could be issued, and that the articles were wholly produced in the beneficiary developing country, in lieu of corrected certificates issued by the certifying authority of the country concerned.

As you know, a correctly completed Certificate of Origin issued by the appropriate agency of the foreign government of the beneficiary developing country is a condition precedent to granting duty-free treatment under GSP (with limited, inapplicable exceptions).

Under the circumstances, you are directed to deny the protest in full. Your file is returned herewith.

(C.S.D. 81–15)

## Constructed Value: Architectural Drawings of Building Furnished to Foreign Fabricators of Building Stones

Date: July 14, 1980
File: CLA–2:RRUCV
061577 RS/RP

To: District Director of Customs, New Orleans, La.
From: Director, Classification and Value Division.
Subject: Internal Advice No. 175/79; Dutiability of Architectural Drawings.

For the purpose of appraisement under section 402 or 402a of the Tariff Act of 1930, as amended.

*Issue.*—1. Are the architectural drawings described below dutiable?

2. If so, how should Customs determine their value?

*Facts.*—The importer, a construction contractor furnished an Italian stone fabricator with detailed architectural drawings for a stone building. The contractor provided the following description of the transaction.

> After the importer is selected as the stone subcontractor for setting stone on a mausoleum, commercial building, or other project, the general contractor provides several sets of the architect's basic drawing of the structure. Thereafter, these drawings are reproduced, modified, and necessarily extended in the New Orleans office of the importer, in order to be more particular with respect to size and placement of stone pursuant to the architect's direction and in coordination with other trades. The importer's drawing is then sent to the supplier as part of the importer's order for fabricated material. Thereafter, the fabricator abroad makes shop drawings or setting drawings. This drawing may contain the same elevations but (as demonstrated during our meeting with Customs) is often extended to produce and match stone which will bring about the appropriate blend or continuity of material in areas, as well as additional details. Such new work, may or may not include a number of individual drawings specified by the importer.

*Law and analysis.*—Constructed value under section 402 and cost of production under 402a of the Tariff Act of 1930, as amended (19 U.S.C. 1401a and 1402) are based in part upon the cost of materials, fabrication, and "other processing of any kind employed in producing such or similar merchandise * * *" Costs of design, patterns or blueprints may form a part of constructed value or cost of production, whether or not such costs are incurred by the manufacturer. The problem is to distinguish designs, patterns, and blueprints that are to be considered a processing cost from those that are not.

In *Ravenna Mosaics, Inc.* v. *United States*, T.D. 41503, G.A. 9120 (1926), the Board of General Appraisers held that the cost connected with plans or sketches for mosaic pictures supplied by the importer to the German manufacturer formed part of dutiable value, even though the manufacturer used its own more detailed shop designs in order to produce the merchandise. The court upheld the original appraisement because "the plans were used in connection with the production of the merchandise." Similarly, in *Troy Textiles Inc.* v. *United States*, R.D. 11697, 64 Cust. Ct. 654 (1970), the Customs Court ruled that cost connected with the fabric designs supplied by the importer to the foreign manufacturer were attributable to the cost of producing the subject merchandise and formed part of dutiable value. The manufacturer copied each design and engraved it on steel rollers. Upholding the appraisement, the court found that the designs were "used as a guide in preparing the engraving to be done on the rollers" and that "it is necessary that the design be with the manufacturer at the time the steel rollers are engraved."

In contrast to precedents such as *Ravenna* and *Troy Textiles*, which follow what might be called a necessity or but for test, are two cases which established what is known as the what to do or specifications versus how to do it or patterns test. *Styles for Boys, Inc.* v. *United States*, R.D. 11617, 62 Cust. Ct. 772 (1969) aff'd A.R.D. 272, 64 Cust. Ct. 857 and *Exbrook, Inc.* v. *United States*, R.D. 11772, 69 Cust. Ct. 224 (1972) concerned the appraisement of imported garments under section 402(d). The importers supplied the manufacturers with designs and specifications. The court held in the former case that such styling and design costs were "nothing more than having the knowledge of what will sell in the markets of the United States," partly because "the sweaters involved were of common variety which were ordered prior to the formation of (the design firm related to the importer)." In *Exbrook*, the court held that the cost of specifications supplied by the importer were "instructions which every buyer must give to a manufacturer" and thus "relate primarily to the purchaser's role in the transaction."

It is clear that neither test is completely satisfactory because neither provides a certain result. Each case must be evaluated independently. Whether the costs associated with specifications, blueprints, patterns, designs, or whatever they may be called, are dutiable depends on a number of factors, including: whether the merchandise is made to order or ordered from stock, whether it is unique, whether the importer communicates more than numerical dimensions and standard material quality information about the merchandise, the amount of

original work product and detail in the communication to the foreign manufacturer, the degree to which the information supplied by the importer establishes the identity of the merchandise or determines the method of its production. The fact that the manufacturer must develop its own shop drawings on the basis of information supplied by the importer does not automatically mean the importer's contribution is nondutiable.

Given the facts you describe, the architectural drawings prepared by the importer and used by the stone fabricator are necessary to the production of the imported cut stones. The drawings are detailed and contain a significant amount of work product that is not commonly known or in the public domain. Although the fabricator developed its own shop drawings, the drawings supplied by the importer were more like the designs and patterns in *Ravenna* and *Troy Textiles* than the specifications in *Styles for Boys* and *Exbrook*. They are such highly refined specifications that they are more appropriately called designs or patterns.

Under section 500 of the Tariff Act of 1930, as amended (19 U.S.C. 1500), the appropriate Customs officer is instructed to appraise the imported merchandise "by ascertaining or estimating the value thereof by all reasonable ways and means in his power * * *" This principle applies as well to the costs of manufacturing units supplied free of charge to the manufacturer.

Those costs directly associated with preliminary drawings, sketches, outlines, etc., should be excluded from appraised value. Those dutiable costs identified with the architectural drawings should be included in appraised value. Where and how the line is drawn depends on the information available in each case.

If the architect's fee is not allocated to the preparation of specific drawings, as in most cases it is not, Customs officials should consult with the party or parties involved to develop the necessary information. Only if this approach is unfeasible or unproductive in a specific case, should Customs officials resort to other costing methods.

*Holdings.*—1. The appraised value of the imported merchandise should include the cost or value of the final architectural drawings used by the stone fabricator.

2. The appraising officer should use all reasonable ways and means to determine the cost or value of the assist. If actual data is unavailable, he or she may use the best alternative available.

3. To the extent that this determination is inconsistent with any other headquarters ruling on this subject, the earlier rulings are modified prospectively, in accordance with section 177.9(d) of the Customs Regulations.

(C.S.D. 81–16)

## Value: Whether "Colorways" Are Dutiable Assists

Date: July 25, 1980
File: CLA–2:RRUCV
065209 JV

To: District Director of Customs, Los Angeles, Calif.
From: Director, Classification and Value Division.
Subject: Internal Advice Request No. 49/80.

This request concerns the dutiable status of certain assist activity undertaken by the importer in the United States and transmitted to the foreign manufacturer.

*Issue.*—Whether "colorway" activity, i.e., artist's renditions of various tone and color combinations done in the United States on preexisting fabric designs, constitutes a dutiable assist whose cost or value is to be included in the appraised value of subsequently imported textile fabric.

*Facts.*—The activity in question consists of the preparation in the United States by the importer of what are known in the textile trade as colorways. The merchandise to which this activity relates is textiles in the piece, printed. Colorways are described as variations in color on a preexisting design. The term "design" is used here in its ordinary meaning as being to conceive and execute shapes, figures, and lines in an arrangement one to the other so as to result in a visual impression readily distinguishable from any other arrangement of shapes, figures, or lines. This usage is limited to the medium of printing of textiles.

The activity here begins with the receipt by the importer of preexisting designs originally created and supplied by the foreign textile mill. The designs will generally be in the form of small paintings of a textile design, commonly called a croquis, and the remainder of the colorways originate from swatches of a printed textile which also originate with the mill.

Upon receipt of the designs the importer, based on its study and knowledge of textile trends and market predictions, may adopt the color design as furnished by the mill or, as here, determine to render that design in different color tone applications. It is this process of rendering the supplier-submitted designs in varying color tone applications, known as colorways, that is the subject of this ruling request.

Trade information submitted to this office indicates that colorways are produced in various ways, ranging in extremes from the very simple with little effort to the very intricate, using the labor and

skills of many individuals. Basically, colorways consist of designs or patterns of shapes with color combinations in the design. The design is colored by an artist mixing various color paints to arrive at a desired color and then applied to the design. Some designs are basic where most of the art work is in the mixing and application. Once the desired colorway is completed with design and color, it is sent to the art or printing department for matching and printing onto the fabric.

Submitted are four exhibits intended to represent the colorway applications of the foreign-supplied designs. Exhibit 1 includes a swatch of a textile in a design as received from abroad, with tracing paper added in the United States as an overlay. It is the textile swatch underneath the tracing paper overlay that is the design as received from the foreign supplier. The tracing paper on exhibit 1 represents a tracing of the design itself, without the design's colors, onto the overlay tracing paper. This tracing paper, as on exhibit 1, would then be utilized in producing what is itself then called a colorway, and which is in part represented by the remaining exhibits. The overlay on exhibit 1 is not itself, however, yet a colorway.

Utilizing the overlay from exhibit 1, a colorway may be produced by transferring the overlay design to either another overlay medium or directly onto a given ground shade for subsequent color rendering. Exhibits 3 and 4 illustrate this process. Exhibit 3 would be produced by utilizing the overlay from exhibit 1, tracing the design onto the background paper, and then by hand rendering the design shapes into different color schemes as may be dictated, for example, by the background ground shade itself. In exhibit 4, the overlay design would be traced onto a clear acetate, which is itself then laid over a ground shade, in the instance of exhibit 4, a dark blue shade. The color rendition of the design found on the textile on exhibit 1, would then be directly painted on the acetate overlay on exhibit 4, as that exhibit illustrates. You will note in exhibit 3 that the design from exhibit 1 has been traced directly onto the ground paper, and the color rendering of the design is only partially completed in exhibit 3, which partial completion is for purposes of illustration here. While not illustrated by a separate exhibit, a design such as found in exhibit 1 could be copied entirely by the eye onto a resulting colorway such as exhibited by exhibit 3. Such an eye transfer of the design would not utilize the overlay found on exhibit 1. It would, however, be intended to represent the design of the textile on exhibit 1, apart from variations in colors.

Exhibit 2 is intended to represent another method of producing a colorway. The design supplied by the foreign supplier may, in many instances, first be reproduced by means of a Xerox machine-made copy as shown on exhibit 2. Utilizing rice paper as an overlay, the design

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taken from the Xerox copy underneath will be rendered into different color tones as illustrated on exhibit 2 on the rice paper thereon. The rice paper would itself then be the colorway when completed, but the example on exhibit 2 has not been completed. Xerox copies are used as they are frequently easier to see and to hold in place, resulting in greater accuracy in duplication than used on the textile itself.

The colorways, then, are the varying color renditions illustrated on exhibits 2, 3, and 4. Stated another way, a colorway is simply a painted or colored overlay that differs from the prototype design in the color variations.

The selected colorway renditions of the foreign-supplied designs are then returned to the original designers abroad who will in turn utilize the colorway's color selections to print the design they had originally supplied.

*Law and analysis.*—We have considered the arguments expressed in the record as to the issue presented and conclude, based on the following considerations, that the activity in question falls within the ambit of those activities held by Customs and the courts to be nondutiable assists.

The fact that the designs from which the colorways are produced originate with the mills is strong indication that the mills possess the technical expertise to print the designs and resulting fabric without assistance from the importer. In this context, the comparatively recent statement of the Customs Service on design specifications is most pertinent. Reference is made to the following quotation in headquarters response to application for further review of protest No. 4101–6–000062, dated September 28, 1977 (541455).

> It is our position, after a detailed review of all precedents, that what should be controlling is the position of the foreign manufacturer vis-a-vis the drawing received. If the foreign manufacturer does not possess the technical expertise to manufacture the ordered item without the drawing/specifications, then such a drawing would properly be treated as being dutiable. However, if the manufacturer possessed the requisite technical expertise and treated the drawings as it would any narrative specifications, then the drawings would not be treated as being dutiable.

In that case, the evidence disclosed two facts which we viewed as being quite significant. First, the foreign manufacturer utilized the importer-supplied blueprints solely to obtain the desired dimensions of the imported piston rings and according to the established evidence was capable of producing such products without any assistance being furnished by the importer. On the basis of these facts, headquarters concluded that the blueprints were merely specifications and that based on *Styles for Boys, Inc., James G. Wiley Co.* v. *United States*, 62 Cust. Ct. 772, R.D. 11617 (1969 aff'd 64 Cust. Ct. 857 (1970)) and

*Exbrook, Inc.* v. *United States*, 69 Cust. Ct. 224 (1972), were not to be treated as dutiable.

It is our position, based on the principles enunciated in the above-cited cases and the established facts, that the assist supplied in the present case is conceptual in nature and constitutes a specification of the color desired which the mill options to the buyer. As a result, its cost is not a necessary element of value to be included in the appraised value of the subsequently imported fabric.

In the cases you cite to support your contention that colorway is a dutiable function, the facts are clearly distinguishable. In those cases, the designs or patterns in their entirety originated with the buyers and were required by the manufacturers to produce the imported goods. Apparently, the manufacturers did not have the expertise or capability to produce the goods without such assistance. Furthermore, that which was furnished went beyond such considerations as size, shape, or, as in this case, color.

Further reference is made to internal advice 156/78, published as C.S.D. 79–297, dated April 3, 1979. The drawings involved in that ruling were for the production of baseball gloves. A full reading of the text of that ruling shows most clearly that what was imparted through those drawings was not a color scheme or even a variation of a baseball glove design originally supplied by the foreign manufacturer. Rather, the importer, through the drawings, conveyed to the seller certain configurations from which the manufacturer-seller presumably prepared cutting dies. As stated therein, the drawings that were the subject of that ruling were "meant to be the basis for the creation of a type of glove not readily made by the manufacturer." Here, on the contrary, the textile designs are most obviously of a design, in fact, readily made by the manufacturer, as it is the manufacturer who provides the original design.

Of critical importance here is the fact that the colorways in no way alter the original design of the print apart from altering the color scheme, and in this respect, are far less than the sweater and shirt configurations held to be nondutiable in *Styles for Boys, Inc.* and *Exbrook, Inc.*, supra. Further, while it is true that the mills are requested to match the colors desired to the colorways, the colorways themselves are not accompanied by industrial color code references or specifications as to the composition of color dyes or related technical printing instructions. The colorways, which are complete unto themselves, merely illustrate the coloration desired; they do not provide detailed instructions to the mills on how to print the fabrics.

As pointed out by counsel, every buyer's request or specification, in a broad sense, assists the seller in satisfying that buyer and consequently making a sale. All such requests or instructions inherently

require some response by the seller in adjusting his fabrication process to meet such order requirements. However, where, as here, the response is only to vary the colors of an existing print design, there is no cost of manufacture which the mill has been relieved from incurring or would have otherwise incurred. There is, then, no assist supplied to which the current appraisement laws apply (sections 402 and 402a, Tariff Act of 1930, as amended).

*Holding.*—Colorway activity done in the United States on preexisting fabric designs furnished by the foreign textile mill is not a dutiable assist whose cost or value is to be included in the appraised value of subsequently imported textile fabric

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(C.S.D. 81–17)

Cost of Production: Allocation of Fixed Overhead Costs; Dutiability of Warranty Costs

Date: June 2, 1980
File: CLA–2:RRUCV
542126 BS

Re Application for further review of protest Nos. 1401–8–000245 through 1401–8–000250.

DISTRICT DIRECTOR OF CUSTOMS,
*Norfolk, Va.*

DEAR SIR: The above-captioned matter was the subject of a headquarters ruling dated March 26, 1980. While our decision to deny the protests remains unchanged, we have made certain revisions to page 6 of the original ruling. Accordingly, please change your records and substitute the ruling, as set forth below, for the ruling of March 26.

The primary issue involved in the above-captioned protests is whether the accounting method utilized by the foreign supplier in allocating certain fixed expenses between its European production and its U.S. production may be used in determining the usual general expenses under a statutory cost of production appraisement.

Under the exporter's method of accounting, certain general expense items are excluded from the cost of production of the imported merchandise, for the reason that in the judgment of management, they are not incurred in connection with that part of the production exported to the United States.

Protestant explains that it uses the full absorption costing method of accounting, in that all costs required under such methods to be allocated to units of production are allocated on a disproportionate

basis to the vast majority of production intended for the European market, rather than the small portion of production intended for the U.S. market (stated to be less than 2 percent of total production) because such costs are fixed in nature and are in fact absorbed in the exporter's sales to the European market. Essentially, the argument is that such costs do not increase with the increase in production to the United States. The specific items of cost that are not allocated to U.S. production pursuant to this method of accounting are general plant overhead and maintenance, research and design, and depreciation of machinery and buildings.

Under section 402a(f), Tariff Act of 1930, as amended, the cost of production of imported merchandise includes "* * * the usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise." However, the statute is silent as to the appropriate accounting methods to be utilized to determine the allocation of various general expenses partially attributable to U.S. production when such production is but a part of the total production. Under these circumstances, it is Customs position that a method that allocates certain fixed costs, which would otherwise be at least partially applicable to U.S. production, solely to production for the foreign market cannot be acceptable for purposes of determining statutory cost of production. In this instance, it is our opinion that an equitable method of allocation is one that permits fixed costs to be apportioned equally over the total production.

Concededly, the decision to produce additional automobiles for export to the United States in the instant case may not have increased certain fixed costs. However, this does not warrant an allocation of such costs which may either be grossly disproportionate in favor of European production or which entirely excludes U.S. production from an appropriate share.

This view is not intended to discredit the accounting method itself, which may be a useful tool to the company in terms of decisionmaking regarding changing levels of production, or for other purposes. Rather, we are of the opinion that in the context of a cost of production appraisement, such method is inappropriate. We believe our position is supported by the decision rendered by the Court of Customs and Patent Appeals in *John V. Carr & Son, Inc.*, v. *United States*, 52 CCPA 62 (1965).

In *Carr*, the manufacturer produced identical articles for home consumption and for export to the United States. The substantially higher home market prices were primarily due to the higher general expenses that were attributed to the merchandise produced for domestic consumption. Certain fixed items of overhead (taxes, insurance, depreciation) were entirely excluded from the cost attributable to the

exported merchandise. The court held in that case that the assignment of fixed costs to the extent and in the manner disclosed arbitrarily excluded a fair proportion of overhead expenses relating to cost of production which are reasonably and normally chargeable to export operations.

While in *Carr* the volume produced for sale in the home market was less than that produced for exportation to the United States, in our opinion that fact reinforced the court's determination but was not the central factor which influenced its decision.

Rather, the dominant factor appeared to be the total exclusion of certain fixed expenses from the constructed value computation. The court concurred with the lower court's opinion that—

> "* * * such blanket license to a foreign shipper to estimate costs in accordance with his own peculiar accounting standards is susceptible of depressing the values of imported merchandise and of thwarting the statutory objective of reaching a value as far as possible consistent with that which fairly reflects market value * * *"

The fact that constructed value was the basis of appraisement in *Carr* would not prevent application of its principles to the instant matter, since it is settled law that "* * * constructed value and cost of production formulae are designed, * * * to embrace all expenses of manufacture or fabrication of an article, whether borne by manufacturer or purchaser." (See *Goodrich-Gulf Chemicals Inc.* v. *United States*, 66 Cust. Ct. 509 (1971), R.D. 11733.)

Although it has been held that "* * * slight variations in the cost, which do not appreciably affect the cost called for by the statute may be disregarded in determining the cost of production" (See *Glanson Co.* v. *United States*, R.D. 9208 (1958), aff'd. A.R.D. 110 (1958)), it is apparent that the variation in the instant case is substantial and cannot be disregarded. According to protestant, the unit cost for general expenses per automobile (in French francs) is 1,641.20 by its calculations versus 3,845.51 by Customs calculations. We are of the opinion that the appraising officer's method of allocation (as described, supra) is correct and that the exporter's method of accounting resulted in a gross distortion of the costs of manufacture applicable to goods produced for the U.S. market, and accordingly, cannot be utilized for statutory cost of production purposes.

In the alternative, protestant contends that Customs is estopped from employing a different method of allocating general expenses with respect to the subject entries because it relied on Customs acceptance and approval of the accounting method the company utilized in determining this allocation. Protestant alleges that this method had been utilized since 1958, that several Customs verifications had been con-

ducted since that time but the company was never instructed to change its accounting method in this regard. As a result, protestant continued to rely on Customs approval of the method of accounting used and projected its duty liability on this basis. Protestants vehicles were priced accordingly.

Specifically, protestant alleges that in March 1973, Customs initiated a foreign investigation regarding the costs of production submitted by protestant for its 1972 model automobiles. The investigation was concluded in October 1974, 3 months after the last entry of 1974 model cars had been made, with only minor adjustments to the calculations. At no point during this investigation was the overall method of accounting put into question. In protestant's opinion, the outcome of the investigation, which did not result in any change in the accounting method utilized, must be regarded as approval by Customs of this method which had been used by protestant for approximately 15 years.

A second foreign investigation, this one regarding the model year 1974, commenced in September 1975. While the final report of this investigation proposed a fundamental change in the accounting method utilized, protestant did not learn of the contents of the report until September 1977. Moreover, when liquidation of the 1974 model year entries began in 1978, the method used by Customs was different than the approach taken in the report.

Protestant argues that liquidation of the subject entries at the advance contemplated by Customs would be a retroactive change contrary to established principles of law. Various court decisions are cited as support for its position.

Primarily, these cases deal with situations in which an administrative agency's construction of a statute changes after the aggrieved party had taken certain irrevocable actions in reliance on the prior construction. In those situations, the courts have held that the rights or benefits acquired prior to the change cannot be affected retroactively. (See, for example *Henry Clay & Bock & Co., Ltd.* v. *United States*, 41 CCPA 45 (1953)).

We do not disagree with the protestant's interpretation of the cited cases, nor with the rationale underlying these various decisions. However, we believe that the application of these cases to the particular facts here involved is misplaced.

The cited cases deal with administrative rules that were changed to the detriment of the aggrieved party who had a definite right to rely upon, and did rely upon, the previous stated policy or rule. On the other hand, in the instant case, we have no prior rule or policy, express or otherwise, with regard to acceptance of the type of accounting method utilized by protestant. Mere acceptance of the cost submissions

by Customs does not by itself constitute approval of the methods used by protestant to determine these costs. Nor can we logically infer approval based on an investigation that does not focus on the accounting methods utilized, but rather on the accuracy of the cost figures submitted. We note in this regard that our records fail to disclose any foreign verifications until 1970, and we have no record of the import specialist's final decision with respect thereto. As previously indicated, the verification involving the 1972 model year was concerned solely with the accuracy of the submitted costs, and not the underlying rationale.

Accordingly, we find no prior Customs approval of the accounting method utilized by protestant, and thus no retroactive change in Customs policy in this regard. Moreover, the purpose of a foreign verification is to gather data, and not to appraise merchandise. Therefore, while the investigating agent may have made certain proposals in his final report as to the cost of production submissions on the 1974 model cars, these proposals were not binding on the import specialist, who is the responsible Customs officer on matters of appraisement.

Protestant makes the additional argument that the delay of nearly 5 years in liquidating the subject entries was unreasonable and precludes the imposition of higher duties. It is argued that Customs was entirely at fault for the delay, and that such inaction is in contravention of legislative intent and Customs regulations. (Section 159.51 provides that liquidation of entries shall be suspended only when provided by law or regulation, or when directed by the Commissioner of Customs.) Protestant alleges financial harm as a result of the delay (assuming administrative relief is denied), since it priced its vehicles for subsequent years in reliance on past practice.

The record discloses that the entries in question were the subject of a foreign investigation commencing in September 1975 and which culminated in a final report dated May 19, 1977. The investigation covered not only the accuracy of the submitted costs, but also the methods and systems used by protestant in arriving at these costs.

Based on the scope of the verification, and the heavy backlog of cases faced by foreign Customs representatives during the years in question, protestant has not established that the delay in liquidation was in effect due to Customs negligence.

Protestant also contends that certain warranty costs, included by the appraising officer as part of statutory cost of production, are not properly includable because such costs consist of labor to be performed by protestant in the United States and spare parts which will be separately dutiable upon entry into the United States.

Our position with regard to the dutiability of warranty costs was

set forth in detail in ORR Ruling 76–0072 (File No. 72–024488 RG), dated July 15, 1976, as follows:

> In resolving this issue, it is first necessary to consider whether warranties, as a general rule, are to be considered a part of construction value under section 402(d), Tariff Act of 1930, as amended. We are of the opinion that warranty charges should ordinarily be considered dutiable as a general expense usually reflected in the sale of merchandise for exportation to the United States. We would note initially that most jurisdictions recognize implied warranties in the absence of contrary contractual provisions and sometimes in spite of those provisions. Additionally, a warranty to replace defective parts is something which attaches to the merchandise itself. American jurisprudence indicates that "the term warranty is generally understood as an absolute undertaking in praesenti against the defect." 67 Am. Jur. 2d 587. We conclude, therefore, that a warranty, if usual, may properly be considered a general expense. This conclusion is in accord with *United States* v. *Alfred Dunhill of London, Inc.*, C.A.D. 305 (1945), where the court stated:
>
> > "In our opinion the usual general expenses of a business are the expenses of doing business * * * and profit is calculated on the difference between such expenses and receipts."

In response to a similar argument that warranty cost consists of labor to be performed in the United States, we also pointed out in the ruling that a warranty was not an after-sales service contract, but rather "a guarantee that the manufacturer will produce a product free from defects, and that obligation can be completely satisfied by producing a product free from defects."

While we have held that certain costs of production of an unforeseeable nature may be excluded from dutiable value, warranty costs obviously cannot be placed within this category. Further, it is well established that under the cost of production statute, usual general expenses are those actual general expenses of the manufacturer which are usual for him.

Under these circumstances, you are directed to deny the protests in full.

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U.S. Value: Actual Freight Charges as Permissible Allowances

Date: June 30, 1980
File: CLA–2:RRUCV
061972 RP

To: District Director of Customs, Wilmington, N.C.
From: Director, Classification and Value Division.
Subject: Request for Internal Advice No. 19/80: Appraisement of Stainless Steel Pipe.

This is in response to the referenced request for internal advice con-

335-084 O - 81 - 7

cerning importations of stainless steel pipe from Japan. The exporter and importer are related parties, and the exporter sells the merchandise in question on a c.i.f. basis. The record indicates that sales are not made on an f.o.b. basis. The subject merchandise is imported into the United States using conference and nonconference freight carriers. The conference freight rate for the steel pipe is $175 per metric ton, and the non-conference freight rate is $48 per metric ton.

The issues raised in the instant case concern the dutiable status of the freight charges and the proper basis of appraisement for the imported pipe.

It is the contention of the importer that the subject merchandise should be appraised on the basis of export value, as represented by the selling price less nondutiable charges (one of which is the higher conference rate freight charge). The importer maintains that the lower nonconference rate is a fugitive and nonregular rate, and therefore, not usual or in the ordinary course of trade.

It is the opinion of your office that export value under section 402(b), Tariff Act of 1930, as amended, does not exist for the subject merchandise. You would appraise the imported pipe on the basis of U.S. value (section 402(c)). In support of your position, you rely on headquarters ruling R:CV:V DA, 054793, December 22, 1978, wherein it was held that export value cannot be determined by adding an amount to f.o.b. price list prices equal to the difference between the ocean freight included by the seller and the lowest freight charge actually paid to any U.S. port. In that case, the exporter issued invoices showing f.o.b. unit values with an additional lump sum charge for estimated ocean freight added to the f.o.b prices. Investigation revealed that the estimated charges were in some cases greater than the actual freight charges, and that the exporter did not return the excess amounts to the importer. Since the excess estimated freight charges were not returned to the importer, headquarters determined that the f o.b. prices had, in effect, been increased by an amount equal to the difference between the actual and estimated charges. Therefore, export value was precluded since the f.o.b. price lists did not fully reflect the market value of the merchandise. It should be noted that headquarters ruling cited *United States* v. *Josef Mfg. Ltd.*, 59 CCPA 146, C.A.D. 1057 (1972) in which the court held that the appraiser could not deduct a single freight charge from a uniform price and make a uniform export price, where one does not exist. The court stated that there was an f.o.b. offered price which should be used for appraisement purposes.

In the instant case, the record reflects that sales are not made on an f.o.b. basis. Moreover, the evidence indicates that the exporter does not return the excess estimated freight charges. Therefore, based on the

evidence presented, and in accordance with headquarters ruling and the court case cited above, we are of the opinion that export value does not exist for the subject merchandise.

However, the file does indicate that U.S. value (402(c)) exists for the imported pipe. In telephone conversations with the concerned import specialist, it was learned that each of the seven entries in question represents a single shipment of the subject merchandise, and that every entry lists a different date of exportation. The actual freight charges for each shipment are ascertainable. Lastly, the import specialist has indicated that U.S. value can be determined for the entries under consideration.

Therefore, we agree with your office that the subject merchandise is to be appraised on the basis of U.S. value. We note that the actual freight charges represent the permissible allowances for freight under section 402(c)(2).

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(C.S.D. 81-19)

Classification: Reversible Pump/Turbine; Determination of Principal Purpose

Date: July 24, 1980
File: CLA-2:RRUCGC
061674 BB

AREA DIRECTOR OF CUSTOMS,
*New York, N.Y.*

DEAR SIR: This is in response to request for internal advice No. 215/79, concerning the classification of Francis type, reversible pump/turbines used in pumped storage electric power generation (your reference CLA-2-06-S:C:D-II-CST-21-218).

*Facts.*—The subject merchandise is described as pump/turbines of the vertical shaft, single-impeller-runner, Francis type with spiral case, fixed-stay vanes and wicket gates. These machines are imported for use in connection with pumped storage power generation facilities.

A pumped storage power generation system is designed to provide additional peaking capacity for a power network by using an upper pool of water as a type of storage battery. Such a system normally employs both thermal generators and hydrogenerators. The key to the system is a reversible generator/motor which drives and is driven by the reversible pump/turbine that is at issue here. During periods of low electrical load, such as the early morning hours, excess power from thermal generators is used to drive these machines operating in their motor/pump mode. This moves water from a lower pool to an upper pool. During peak load hours, the water runs down from the

upper pool driving these machines operating in their turbine/generator mode to produce electrical power. This system results in a net loss of electricity since more power is consumed pumping the water to the upper pool than is generated when it flows back down. Yet, the system is economical because power is produced during a high cost period.

These generator/motor and pump/turbine machines are quite large. They normally are specifically designed to meet the requirements of the particular pumped storage project into which they are being installed. The reversible pump/turbine differs from a standard Francis turbine in that the impeller is larger and there are only ⅓ the normal number of vanes on the runner. Some of the efficiency of both a pump and a turbine must be sacrificed in designing a reversible machine.

*Issue.*—The question to be decided is what constitutes the principal purpose of the subject pump/turbines?

*Law and analysis.*—The relevant provisions of the tariff schedules are as follows:

SCHEDULE 6.—METALS AND METAL PRODUCTS

* * * * * * *

PART 4.—MACHINERY AND MECHANICAL EQUIPMENT

*Part 4 headnotes:*

* * * * * * *

2. Unless the context requires otherwise, and subject to headnote 1 to subpart A of this part, a multipurpose machine is classifiable according to its principal purpose, but if such a machine is not described in a superior tariff heading as to its principal purpose, or if it has no one principal purpose, it is classifiable in subpart H of this part as a machine not specially provided for.

* * * * * * *

Subpart A.—Boilers, Non-Electric Motors and Engines, and Other General-Purpose Machinery

*Subpart A headnote:*

1. A machine or appliance which is described in this subpart and also is described elsewhere in this part is classifiable in this subpart.

* * * * * * *

Water wheels, water turbines, and other water engines, and parts including governors therefor:

* * * * * * *

| | | |
|---|---|---|
| 660.76 | Other | 7.5% ad valorem. |
| * | * * * * * * * | |
| | Pumps for liquids whether or not fitted with measuring devices; liquid elevators of bucket, chain, screw, band, and similar types: all the foregoing whether operated by hand or by any kind of power unit, and parts thereof: | |
| * | * * * * * * * | |
| 660.97 | Other | 4.8% ad valorem. |
| * | * * * * * * * | |
| | Subpart H.—Other Machines | |
| * | * * * * * * * | |
| 678.50 | Machines not specially provided for and parts thereof | 4.8% ad valorem |

A multipurpose machine is a machine that performs two or more functions simultaneously or consecutively. Customs has previously recognized that reversible pump/turbines are multipurpose machines. See headquarters ruling letter (HRL) 046629, dated June 17, 1977. Therefore, classification of the pump/turbine is governed by headnote 2 of part 4, schedule 6, Tariff Schedules of the United States (TSUS), which says that, subject to headnote 1 of subpart A, part 4, a multipurpose machine is classifiable according to its principal purpose unless it has no one principal purpose in which case it is classifiable as a machine not specially provided for.

Headnote 1 of subpart A, part 4, schedule 6, TSUS, says that a machine described in subpart A and also described elsewhere in part 4 of schedule 6 is classifiable in subpart A. While certain multipurpose machines are described in subpart A, a machine that is both a pump and a turbine is not. Therefore, headnote 1 of subpart A does not affect the classification of this machine.

The question under headnote 2 of part 4 then becomes whether the pump/turbine has a principal purpose and, if so, what that purpose is. In some past rulings on pump/turbines, Customs has looked to factors like the comparative efficiency of the machine as a pump versus its efficiency as a turbine or the estimated amount of time the machine would be operating in each mode, in order to determine its principal purpose. In others, the principal purpose was assumed to be generation of electricity.

For example, in T.D. 56457 (45) Customs held that a machine with both a turbine runner and a pump impeller mounted on a common shaft within a common housing was classifiable as a turbine in item 660.76, TSUS, because its principal purpose was to operate

a generator. In T.D. 68–170 (16), Customs held that a reversible pump/turbine which was 11 times more efficient as a pump than as a turbine and which would most likely be used 70 percent of the time as a pump was classifiable as a pump in item 660.97, TSUS. In HRL 046629, dated June 17, 1977, Customs held that in the absence of detailed information as to the design and relative efficiencies of a reversible pump/turbine, the machine was classifiable as a turbine. In HRL 056900, dated August 10, 1978, Customs held that a reversible pump/turbine was classifiable as a water turbine where the predominant feature of the device was stated to be a turbine.

This line of rulings on pump/turbines must be compared with the line of Customs rulings on the classification of the reversible generator/motors which are designed for use with the pump/turbines in pumped storage projects. In HRL 007702, dated October 23, 1970, Customs held these generator/motors were multipurpose machines with no one principal purpose. This ruling was based upon the fact that there was little distinction between an electric motor and an electric generator as a machine which can perform both these roles without significant modification. The ruling cites the case of *Edo Commercial Corporation, F.W. Myers & Co., Inc.* v. *United States*, 55 Cust. Ct. 30, C.D. 4049 (1970), which held that a underwater transducer which functioned as both a loudspeaker and a microphone had coequal functions because both these functions were essential to the machine's design. Therefore, the transducer was held to be neither a microphone nor a loudspeaker but more than either. The ruling concludes that a machine which functions as both a generator and a motor has coequal functions where both functions are essential to the machine's design. Therefore, applying headnote 2 of part 4, the generator/motor had no one principal purpose and was classified as a machine not specially provided for.

In HRL 044060, dated March 1, 1976, Customs reaffirmed the classification of these generator/motors as machines NSPF. In this case the arguments were made that the machine was less efficient operating as a motor than a generator, that the unit operated in the generating mode 90 percent of the time and that the overall purpose of the pumped storage project was to generate electricity. Therefore, it was urged that the principal purpose of the generator/motor was that of a generator.

The ruling responds to these arguments by saying that focusing solely on time of operation in each mode confuses the concept of principal purpose with that of chief use. In determining the principal purpose of a multifunction machine under headnote 2, the importance of each of the functions to the operation of the whole machine is highly relevant. It was determined that the generator/motor was

not simply designed to produce electricity, but to produce less expensive electricity during peak load hours. The function of the motor to pump water to a higher level during nonpeak hours was essential to attaining this end, and therefore, essential to the design of the machine. Accordingly, the generator and motor functions were coequal and the machine had no one principal purpose. This position on generator/motors was again reaffirmed in HRL 045444, dated January 9, 1978.

The approach to determining what constitutes the principal purpose of a multipurpose machine under headnote 2 which was taken in our rulings on generator/motors appears inconsistent with the approach taken in some of the rulings on pump/turbines. However, this apparent inconsistency might be reconcilable. The generator/motor rulings did not say that time of operation in each mode or relative efficiencies were irrelevant to determining principal purpose, only that they were not the sole determining factors. Arguably, in the pump/turbine rulings the disparity in time of operation and relative efficiency was so great that one function or the other was plainly auxiliary.

Moreover, mechanical distinctions can be drawn between generator/motors and pump/turbines. Because of the nature of a generator and a motor, no major design changes are necessary to make a machine function efficiently as both. With a pump/turbine, however, turbine efficiency must be sacrificed in designing an effective pump and vice versa. Our earlier pump/turbine cases may have turned on this design problem. When looking at a particular pump/turbine one can determine whether the efficiency trade-off between pump and turbine has been skewed in favor of one or the other function. The way this design problem is resolved may be the single most important factor in determining the principal purpose of a given machine.

Turning then to the machines at issue in this case, from the technical information submitted it appears that the design sacrifices have been made equally between pump and turbine so that the machine operates almost as efficiently as either a pump or a turbine. While no reliable estimates are available for what percentage of time the machine will operate in either mode, it is apparent that both modes must be used since, unlike some earlier pumped storage projects, the projects for which these pump/turbines were designed use the same water tunnel to pump the water up and to run the water back down.

In the generator/motor rulings, we indicated that the purpose of a pumped storage facility was not simply to generate electricity since the operations involved actually result in a net loss of electrical power. The purpose of the facility is to generate low-cost electricity during peak hours. The pump/turbine is as important to the project as the

generator/motor. The pumping function is as essential to the design of the pump/turbine as the motor function is to the design of the generator/motors.

Accordingly, given the information submitted on these pump/turbines and in line with the rationale expressed in our recent rulings on generator/motors, we conclude that the pumping function and the turbine function of this merchandise are coequal. Therefore, these pump/turbines are multipurpose machines with no one principal purpose and, pursuant to headnote 2, part 4, are classifiable as machines not specially provided for.

*Holding.*—The subject merchandise is properly classified under the provision for machines not specially provided for, in item 678.50, TSUS, dutiable, as a product of Japan, at the column 1 rate of 4.8 percent ad valorem if entered on or after January 1, 1980, otherwise at the prevailing rate on the date of entry.

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(C.S.D. 81–20)

Classification: Seat Post Bushings and Handlebar Post Collars; Parts of Bicycles or Tricycles

Date: July 30, 1980
File: CLA–2:RRUCGC
065166 JCH

To: Senior Import Specialist, Mobile, Ala.
From: Director, Classification and Value Division.
Subject: Request for Internal Advice No. 55/80 Concerning the Tariff Classification of a Seat Post Bushing and a Handlebar Post Collar Manufactured in Japan.

The subject internal advice request was forwarded to us on March 12, 1980. Our decision follows:

*Issue.*—Whether the subject merchandise is classifiable under the provision for parts of bicycles, in item 732.42, Tariff Schedules of the United States (TSUS), or under the provision for tricycles and other wheeled goods for children, and parts, in item 732.52, TSUS. The current column 1 rates of duty required under these provisions are 15 percent ad valorem and 8.3 percent ad valorem, respectively.

*Facts.*—The importer has indicated the products in question are parts made to their specifications for use on tricycles and children's bicycles which they manufacture. In a letter dated August 12, 1974, it was stated that the seat post bushing had been used on chain-driven tricycles, but in the 1974 line, it was used only on sidewalk bicycles. In a letter dated September 12, 1977, the importer indicated that

approximately 53 percent of the handlebar post collars were used on tricycles and 47 percent were used on bicycles.

*Law and analysis.*—In accordance with general headnotes 10(e)(i) and 10(ij), TSUS, the classification of a part is determined by the chief use of the class or kind of article to which the imported part belongs. The use to be considered is the use at the time of, or immediately prior to, importation.

When we previously considered the classification of the handlebar post collar, we indicated that the use of a homologous part on adults' bicycles should be considered in determining the chief use of the class or kind of article involved. On reconsideration, we now are of the opinion that the handlebar post collar, as well as the seat post bushing, should be regarded as classes or kinds of articles by themselves. Therefore, our letter of January 23, 1978, file No. 056006, should be considered as modified accordingly.

There are no set rules for determining class or kind. Depending on the facts in each case, the nature of the merchandise, and the wording of the competing tariff provisions, class or kind can be limited to specific imported merchandise or be considerably broader in scope. In the instant situation, the competing tariff provisions encompass closely related products with many homologous and sometimes interchangeable parts. However, the parts at issue are made to specification and lack interchangeability with the homologous parts on anologous products. In these circumstances, we believe it would be incorrect to classify any part which actually is chiefly used on tricycles as a part of a bicycle by increasing the scope of the class or kind involved and by increasing the scope of the bicycle parts provision at the expense of the legitimate coverage of the tricycle and other children's vehicle parts provision.

However, children's bicycles are classifiable under the same provisions applicable to adults' bicycles. Therefore, even though we have limited the class or kind involved, use of either part on a child's bicycle militates against classification under item 732.52.

*Holding.*—The evidence indicates that the seat post bushing is not chiefly used on tricycles. Therefore, it is properly classifiable under item 732.42 or predecessor provisions as they may be applicable.

With respect to the handlebar post collar, the importer should be given an additional 30 days to furnish evidence showing that the part is, in fact, made to specification and that the greater percentage of it use is on tricycles. The evidence should consist of more than self-serving statements and approximations, and should be specific, convincing and prove to your satisfaction a chief use on tricycles.

If such evidence is not furnished and duty is liquidated under item 732.42, the importers still would have the opportunity to submit evi-

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dence supporting their claims in connection with a timely filed protest. A copy of this decision should be made available to the importer.

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(C.S.D. 81–21)

Value: Dutiability of Charges for Quota Rights

Date: September 12, 1980
File: CLA–2:RRUCV
065194 RP

To: Area Director, New York Seaport, New York, N.Y.
From: Director, Classification and Value Division.
Subject: Request for Internal Advice No. 97/80.

This is in response to the above referenced request for internal advice involving the inclusion of quota charges in the appraised value of certain imported wearing apparel.

The record indicates that the U.S. importer purchases the subject merchandise through a bona fide buying agent from a manufacturer in Hong Kong. The buying agent obtains, and is the holder of the export quota rights for the wearing apparel. The issue raised in the request for internal advice concerns whether or not the charges for quota rights form part of the dutiable value of the imported merchandise.

It is the position of your office that the export of the wearing apparel was subject to quota charges and that these charges should be included in the appraised value of the merchandise. You indicate that counsel for the importer has failed to substantiate the separate nature of the quota charge in the form of transfer papers issued by the Hong Kong Government, plus evidence of the actual amount paid to the quota holder. In support of your contention, you rely on a headquarters ruling (file No. 74–540308, dated October 18, 1974) which demonstrates the proofs needed to substantiate the claim that the quota charges do not form part of dutiable value. In addition, you cite a recent headquarters decision (file No. 055267, dated April 1, 1980) in which this office determined that the protestant had failed to substantiate the amount paid by the exporter-manufacturer for certain quota rights. In that case, the quota charges were held to form part of the appraised value of the imported merchandise.

Counsel for the importer contends that the quota charges in the instant case do not form part of the dutiable value of the subject wearing apparel. Counsel maintains that the proof required under ORR ruling 74–540308 (namely, (1) documentary evidence of the transfer of the quota, and (2) documentary proof of payment by check or otherwise for the purchase of the quota by the exporter) places an

unduly onerous burden on the importer, and is unnecessary in light of the facts in this case. Counsel distinguishes the factual situation presented in the instant case from those involved in headquarters April 1, 1980, ruling (file No. 055267). In the April 1, 1980, decision, the manufacturer-exporter purchased the quota, and the protestant failed to submit the proof necessary to establish that the quota charges did not constitute a part of the freely offered price of the merchandise. In the instant case, counsel maintains that the record establishes that the buying agent purchased the quota, and that the invoice value of the merchandise does not include any quota charges. Counsel states that the evidence demonstrates that the manufacturer freely sold or offered the merchandise to the importer without the inclusion of a quota charge; therefore, how or where the importer otherwise obtained the necessary quota is irrelevant in appraising the merchandise in question.

We agree with counsel for the importer that the facts presented in this case are distinguishable from those which were the subject of our April 1, 1980, decision. In the instant case, the evidence of record establishes that the wearing apparel was freely sold without the inclusion of quota charges. The invoice values do not include additional amounts for quota rights, and the affidavit of the manufacturer indicates that the merchandise was freely sold to the importer without inclusion of any quota charge.

It is our opinion that the proof required under ORR ruling 74–540308 is inapplicable in the instant case inasmuch as the buying agent purchased the quota rights rather than the manufacturer, and the record establishes that the manufacturer freely sold or offered his merchandise without the inclusion of an additional amount for quota charges.

In accordance with the above, we find in this particular case that the subject quota charges do not form part of the dutiable value of the imported merchandise.

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(C.S.D. 81–22)

Classification: Radio Remote Controlled Miniature Vehicles

Date: February 15, 1980
File: CLA–2:RRUCGC
062210 c

This ruling concerns the tariff classification of radio remote controlled vehicles.

*Facts.*—The merchandise involved consists of ready-to-run radio controlled vehicles imported in units, each unit consisting of a motor

vehicle with an accompanying hand-held transmitter. Batteries are not included with the merchandise at the time of importation.

The specific articles in issue are described as follows:

| *Model* | *Prototype article* |
|---|---|
| 1. Giant F–1 Racer (No. 1003) | Mclaren M23 Formula 1 |
| 2. Demo Derby Racing Set (No. 1007) | 1931 model A Ford |
| 3. Giant 79 Corvette (No. 1013) | 1978 Corvette Stingray |
| 4. 1978 Corvette (No. 1009) | 1978 Corvette Stingray |
| 5. Ferrari (No. 1004) | Ferrari (1977) |
| 6. Porsche 935 (No. 1010) | Porsche 935 |
| 7. Porsche 935 (No. 1015) | Porsche 935 |
| 8. Starsky & Hutch (No. 1012) Ford Torino | 1975 Ford Torino |
| 9. Porsche 935 (No. 1500) (3 function) | Porsche 935 |

The inquirer states that all the vehicles are made to scale and are modelled after specific motor vehicles, although there may be small variations on certain parts of the motor vehicles.

It is the position of the inquirer that the motor vehicles listed above, along with their hand-held transmitters, should be considered entireties classifiable under the provision for other models, in item 737.15, Tariff Schedules of the United States (TSUS).

In the alternative, the inquirer claims that the motor vehicles should be classified under item 737.15, TSUS, as other models, and the hand-held transmitters should be classified separately under the provision for radio remote control apparatus, in item 685.60, TSUS.

With respect to the classification of the Demolition Derby Race Set (No. 1007) the inquirer claims alternatively that it should be classified under the provision for game machines, including coin or disc operated game machines, and including games having mechanical controls for manipulating the action, in item 734.20, TSUS.

*Issue.*—Whether the radio controlled vehicles imported with the hand-held transmitters are classifiable as claimed by the inquirer or are classifiable under the provision for other toys, not specially provided for, in item 737.95, TSUS.

*Law and analysis.*—Schedule 7, part 5, subpart E, headnote 2, TSUS, provides that "For the purposes of the tariff schedules, a toy is any article chiefly used for the amusement of children or adults."

The superior heading to item 737.15, TSUS, provides for "Model trains, model airplanes, model boats and other model articles, *all the foregoing whether or not toys* * * *." [Italic added.]

A model is a representation of a particular object having either a

present or prior physical existence, a contemplated future existence, or an existence in plans or drawings, literature, or folklore.

In the case of *Lohzin & Born* v. *United States*, 79 Cust. Ct. 34 C.D. 4710 (1977), the court suggested that to come within the common meaning of the term "model" an article need not be an exact or accurate representation of something in existence; "It is sufficient if it is more than a crude form of a class of articles and recognizably represents an article that existed in fact or legend".

In the case of *Arthur R. Sawers* v. *United States*, 60 Cust. Ct. 593, C.D. 3467 (1968), the court, in holding that model boats of superior quality and craftmanship were classifiable as models under item 737.15, TSUS, very liberally construed that provision, stating "that item 737.15, in providing for model boats, encompasses all forms of model boats irrespective of value, quality, or craftsmanship."

Clearly, the vehicles in issue being more than crude representations of the actual prototypes are models within the purview of item 737.15, TSUS, noting the cited court cases.

With respect to the entirety question, the court stated in the case of *Donald Ltd., Inc.* v. *United States*, 32 Cust. Ct. 310, C.D. 1619 (1954) that "If what is imported as a unit is actually and commercially two or more individual entities which, even though imported joined or assembled together, nevertheless, retain their individual identities and are not subordinated to the identity of the combination, duties will be imposed upon the individual entities in the combination as though they had been imported separately. Conversely, if they are imported in one importation separate entities, which by their nature are obviously intended to be used as a unit, or to be joined together by mere assembly, and in such use or joining the individual identities of the separate entities are subordinated to the identity of the combined entity, duty will be imposed upon the entity they represent.

It is our view that the model vehicles and the hand-held transmitters are not entireties for tariff purposes. An examination of the merchandise involved convinces us that the model vehicles and the hand-held transmitters, although packaged, imported, and sold together, retain their individual identities and are not subordinated to the identity of the combination.

It is to be noted that in a similar situation this office held, in a ruling abstracted as T.D. 56237 (118), that transformers imported with TT gauge model railroad equipment were separately classifiable as such under item 682.10, TSUS, and were not classifiable as entireties along with the other model railroad equipment under item 737.07, TSUS.

*Holding.*—The vehicles are classifiable under the provision for other models, in item 737.15, TSUS, and dutiable at the rate of 16.3 percent

ad valorem, or are entitled to free entry under the generalized system of preferences, if qualified.

The hand-held transmitters are classifiable pursuant to an established and uniform practice under the provision for radio remote control apparatus, in item 685.60, TSUS, and dutiable at the rate 7.2 percent ad valorem, or are entitled to free entry under the generalized system of preferences, if qualified.

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(C.S.D. 81–23)

Classification: Application of C.A.D. 1243 and C.A.D. 1244 with respect to Timing Apparatus

Date: June 26, 1980
File: CLA–2:RRUCSC
063782 LLB

AREA DIRECTOR, U.S. CUSTOMS SERVICE,
*Jamaica, N.Y.*

DEAR SIR: In your memorandum of May 14, 1980 (CLA–2–K:C JM/AB), you forwarded the comments of your office relative to the recent decisions of the U.S. Court of Customs and Patent Appeals in the case of *United States* v. *Texas Instruments Inc.*, C.A.D. No. 1244 (decided April 17, 1980, regarding the application of this decision to watches and watch movements).

The court held that an integrated circuit chip on a substrate, imported to be included in the manufacture of a solid-state digital watch, was not a subassembly of a watch movement within the meaning of the Tariff Schedules of the United States (TSUS). A companion case (C.A.D. 1243), held that the VLED display element for a solid-state digital watch was not a watch dial within the meaning of the tariff schedules.

We are of the opinion that merchandise similar to that which was before the court in the two referenced cases shall be classified as determined by these decisions. The current classification practice with respect to all other articles covered in schedule 7, part 2, subpart E, will not be changed by the subject court cases.

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(C.S.D. 81–24)

Classification: Machine-Threshed Cigar Tobacco; Scrap Tobacco

Date: June 29, 1980
File: CLA–2:RRUCGC
066021 JH

Your letter of May 19, 1980, concerns the application of T.D. 80–132 to cigar tobacco.

You note that the notice described the product in issue as machine-threshed cigarette leaf tobacco and your concern is whether cigar tobacco processed in a similar manner is to be similarly classified.

Part 13 of schedule 1, Tariff Schedules of the United States (TSUS), which covers tobacco and tobacco products, recognizes that there is a difference between cigar and cigarette tobaccos. This distinction has always been acknowledged by administrative decisions, which have also recognized that there is a difference in cigar tobaccos.

Customs has always recognized that the tobacco used as filler tobacco in cigars is of a different type than used in cigarettes, and undergoes processing which results in important differences in chemistry and taste of the leaf. The provisions in the tariff for cigar filler tobacco have always been interpreted as applying to long-filler tobacco leaves, which, when laid or folded together lengthwise, run the whole length of the cigar. In contrast, the short-filler or scrap cigar is said to be made up of scrap, cut, or broken tobacco. Accordingly, cigar filler tobacco is classified according to whether or not it was capable of being used as long-filler tobacco. Cigar filler tobacco which is not capable of being used for the long-filler tobacco cigars is classified as scrap tobacco. The numerous decisions on the subject recognized that the provision for scrap tobacco included tangled leaves of varying lengths, all of which could not economically be processed for use in long-filler cigars. The term "scrap tobacco" not only included production fragments or factory scraps but also manufactured scraps, which generally included the cheapest form of smoking tobacco which had been broken or cut. As to tobacco which has been cut, Customs has long been aware that such tobacco was often deliberately changed in condition to come within the scrap category.

In sum, cigar filler tobacco, which is not suitable for long-filler cigars by a long standing uniform and established practice, has been classified as scrap tobacco in item 170.60, TSUS. It is not the length of the tobacco which determines the classification, but its overall suitability for long-filler cigars.

There is no basis for applying this criteria—i.e., suitable for long-filler cigars to cigarette tobacco. Therefore, Customs is of the opinion that, since (1) cigar tobacco is distinguishable from cigarette tobacco, and (2) classification depends on end-product use, cigar tobacco processed in the manner described for use in short-filler or scrap cigars would be classifiable as scrap tobacco in item 170.60, TSUS.

(C.S.D. 81-25)

## Classification: Whether Textile Pencil Loops On Boys' Denim Overalls Constitute Ornamentation

Date: July 11, 1980
File: CLA-2:RRUCGC
064148 PR

This ruling concerns the tariff classification of boys' denim overalls with pencil holder loops.

*Facts.*—The submitted sample is a pair of boy's bib-type denim overalls. Centered on the bib portion of the overalls is a large patch pocket. Directly above this patch pocket, a strip of matching textile fabric has been stitched to the garment to form four loops through which pencils may be inserted. A photocopy of this portion of the garment is attached.

*Issue.*—The only issue presented by the subject inquiry is whether the strip of fabric forming the pencil loops above the patch pocket on the bib of the subject overalls will cause that garment to be classified under the ornamented provisions of the tariff schedules.

*Law and analysis.*—Headnote 3, schedule 3, Tariff Schedules of the United States (TSUS), sets out the features which may cause a textile article to be classified as ornamented. One of the features specifically mentioned in headnote 3 is textile fabric. However, the term "ornamented" as defined in headnote 3, has been interpreted to mean that a textile article is not automatically considered ornamented for tariff purposes merely because of the presence of one of the enumerated features. To be ornamented for tariff purposes, one of the listed features must not only be present on the textile article, but that feature must primarily serve to adorn, embellish, decorate, or enhance the appearance of the article. Where a feature performs a functional purpose which is paramount to the decorative effect created, that feature will not cause the article to be classified under the ornamented provisions of the tariff schedules. *Blairmoor Knitwear Corp.* v. *United States*, 60 Cust. Ct. 388, C.D. 3396 (1968).

As can be seen from the attached photocopy, the fabric loops do function to hold pencils and pens in place. Therefore, following *Blairmoor*, what must be determined is whether the functionality of the textile strip forming the pencil loop is outweighed by the visual effect that strip imparts to the garment. In this instance, considering the color, type of fabric used, size and location of the textile strip forming the pencil loops, and the type of garment on which that strip is located, it does not appear that the strip performs a primarily decorative function.

However, we believe it is pertinent to discuss the three reasons advanced to this headquarters for classifying the sample garment under the ornamented provisions of the tariff schedules. The first reason advanced is that while bib pockets of the type found on the subject garment are often divided into small compartments, this was not done in this instance. The manufacturer, rather, achieved the same effect by adding the additional strip of fabric in the form of loops to hold the pencils. In this regard, *Blairmoor* specifically stated that the question of ornamentation of a garment was to be resolved based on the condition of that garment as imported and not on its condition as it could have been made.

In T.D. 56190 (223), Customs held that textile loops on boys' camping shorts would not cause those shorts to be ornamented for tariff purposes. Further, the Customs Service ruled on September 17, 1979, file 061456, that a child's bib cotton denim overall was not ornamented for tariff purposes because of the presence of a V-shaped pocket with decorative stitching that formed three compartments of limited depth. Those compartments were capable of holding small articles such as crayons or pencils. In that ruling, it was stated, "The Customs Service does not assume that children will not use this pocket for the use for which it was intended."

It is also contended that the pencil loops are not functional because the overall "is not so intrinsically connected with school activities" which would require the use of pencils by the wearer of the garment. This theory of classification is unacceptable. First, the Customs Service is aware of no garment, other than certain uniforms which are required by some private schools, that are intrinsically connected with school activities. Second, garments of the type here presented can, and very probably would, be worn by small children, on an occasional basis, to school. Third, such a position overlooks the fact that children do use pencils and pens when playing in and around the house.

The third reason advanced for calling the fabric strip forming a pencil loop ornamentation is that the feature is analogous to an epaulet, a feature that can be used, but rarely is, and, therefore, is considered ornamentation on most garments. Proceeding on such a theory would put Customs into a position of making determinations on the classification of garments based on an individual's perception of whether certain features would or would not be used. The result would be confusion and a lack of uniformity in the classification of merchandise. The subject pencil loops are not in the same class or category as epaulets. Epaulets have evolved through years of use from what was once a part of the garment intended for both functional and decorative purposes to become a styling feature on a wide as-

sortment of garments. Therefore, the pencil holder loops cannot validly be compared to epaulets.

*Holding.*—Based on the above, the fabric strip forming pencil loops on the sample garment does not constitute ornamentation for tariff purposes.

# U.S. Customs Service

## *General Notice*

### American Manufacturer's Petition

Decision denying American manufacturer's petition requesting the reclassification of radio remote control apparatus: Petitioner's desire to contest this decision

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of (1) decision on American manufacturer's petition, and (2) receipt of notice of petitioner's desire to contest the decision.

SUMMARY: In response to an American manufacturer's petition requesting that radio remote control apparatus designed to be used with toy and model airplanes, boats, tanks, and similar articles, be reclassified under the provision for toys, and parts of toys, not specially provided for, other, in item 737.95, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), Customs advised the petitioner that such radio remote control apparatus would continue to be classified under the provision for radio remote control apparatus in item 685.60, TSUS. Upon being informed that its petition had been denied, the petitioner filed notice of its desire to contest the decision.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-8181.

SUPPLEMENTAL INFORMATION:

#### BACKGROUND

A petition was filed under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), by Kraft Systems, Inc., of Vista, Calif., an American manufacturer, requesting that imported radio remote control apparatus, designed to be used with toy and model airplanes, boats, tanks, and similar articles, be reclassified under the provision for toys, and parts of toys, not specially provided for, other, in item 737.95, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). Radio remote control apparatus is specifically provided for, and uniformly classified by Customs, under item 685.60, TSUS. Notice of

the petition was published in the Federal Register on May 10, 1979 (44 F.R. 27528).

In support of its contention that the radio remote control apparatus involved is properly classifiable as a toy under item 737.95, TSUS, the petitioner made the following arguments:

(1) The intent of Congress was to include only extremely sophisticated military and scientific radio remote control apparatus in the provision for radio remote control apparatus in item 685.60, TSUS; and

(2) Radio remote control apparatus which is used with toys and model airplanes, boats, tanks, and similar articles, is classifiable according to its chief use, i.e., toys for the amusement of children or adults.

Customs is of the position that the legislative history to item 685.60 TSUS, does not support the petitioner's contention that only sophisticated military and scientific radio remote control apparatus were intended by the Congress to be included under this item of the tariff schedules.

Further, Customs does not believe that the radio remote control apparatus involved can be classified as a toy under item 737.95, TSUS, because it does not provide amusement in and of itself. It amuses only in connection with model airplanes, boats, tanks, and similar articles. See *Mattel Inc.* v. *United States*, 61 Cust. Ct. 75, C.D. 3531 (1968).

DECISION ON PETITION AND RECEIPT OF PETITIONER'S NOTICE OF DESIRE TO CONTEST

By letter dated October 2, 1980, file No. 521489, the petitioner was advised that his petition was denied and that Customs would adhere to its practice of classifying radio remote control apparatus designed to be used with toy and model airplanes, boats, tanks, and similar articles under the provision for radio remote control apparatus in item 685.60, TSUS.

In response, by letter dated October 30, 1980, the petitioner filed notice of its desire to contest this decision in accordance with section 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.23, Customs Regulations (19 CFR 175.23). However, under section 516(d), Tariff Act of 1930, as amended (19 U.S.C. 1516(d)), the current Customs practice of classifying this type of radio remote control apparatus under item 685.60, TSUS, will continue so long as no decision of the U.S. Court of International Trade or the U.S. Court of Customs and Patent Appeals not in harmony with this practice is published.

AUTHORITY

This notice is being published in accordance with section 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.24, Customs Regulations (19 CFR 175.24).

DRAFTING INFORMATION

The principal author of this document was Barbara E. Whiting, Regulations and Information Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: Jan. 8, 1981.

WILLIAM T. ARCHEY,
*Acting Commissioner of Customs.*

[Published in the Federal Register, Jan. 19, 1981 (46 F.R. 5120)]

# United States Court of International Trade



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# Decisions of the United States Court of International Trade

(Slip Op. 80–15)

THE BUDD COMPANY, RAILWAY DIVISION, PLAINTIFF *v.* UINTED STATES, DEFENDANT, NISSHO-IWAI AMERICAN CORPORATION AND KAWASAKI HEAVY INDUSTRIES, LTD., INTERVENORS, PARTIES-IN-INTEREST; AND BREDA COSTRUZIONI FERROVIARIE, S. P. A., INTERVENOR, PARTY-IN-INTEREST

*Opinion and Order*

Court No. 80–3–00505

[Motion by plaintiff for summary judgment and cross-motions by defendant and intervenors parties-in-interest for summary judgment. Remanded for further consideration by the International Trade Commission.]

(Dated December 29, 1980)

*Barnes, Richardson & Colburn* (*Andrew P. Vance* and *Raymond F. Sullivan* on the briefs) for the plaintiff.

*Alice Daniel*, Assistant Attorney General; *David M. Cohen*, Director, International Trade Field Office, Commercial Litigation Branch (*Francis J. Sailer* on the brief) for THE UNITED STATES, Defendant.

*Arent, Fox, Kintner, Plotkin & Kahn* (*Stephen L. Gibson* and *Evan R. Berlack* on the briefs) for NISSHO-IWAI AMERICAN CORPORATION and KAWASAKI HEAVY INDUSTRIES, LTD., Intervenors Parties-in-Interest.

*Bosco & Curry* (*Joseph A. Bosco* on the briefs); *Landfield, Becker & Green* (*William W. Becker* on the briefs) for BREDA COSTRUZIONI FERROVIARIE, S.p.A., Intervenor Party-in-Interest.

BOE, Judge: The plaintiff, The Budd Company, Railway Division, which assembles rail passenger cars as well as manufactures certain components and parts therefor at its plant in Philadelphia, Pa., brings this action under section 516(a)(1)(D) of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979 contesting the preliminary determination by the U.S. International Trade Commission (Commission) of "No Reasonable Indication of Material Injury" in *Rail Passenger Cars and Parts Thereof Intended for Use as Original Equipment in the United States from Italy and Japan*. Investigations Nos. 731–TA–5 and 6 (Preliminary). 45 F.R. 11942–43 (published Feb. 22, 1980).[1]

The antidumping investigative proceedings instituted by the Commission pursuant to the petition filed by the plaintiff relate specifically to contracts executed between: (1) The Greater Cleveland Regional Transit Authority and Breda Costruzioni Ferroviarie, S.p.A. (Breda) of Italy in 1978 for the purchase of 48 light rail vehicles; (2) the Southeastern Pennsylvania Transportation Authority and Nissho-Iwai American Corp. and Kawasaki Heavy Industries, Ltd., (Nissho-Iwai) of Japan in 1979 for the purchase of 141 light rail vehicles; (3) the Washington Metropolitan Area Transit Authority and Breda of Italy in 1979 for the purchase of 94 rapid transit cars.

In this action the plaintiff requests that the court: (1) Find the preliminary determination by the Commission that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of the importation from

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[1] The Trade Agreements Act of 1979 expressly repeals the Antidumping Act of 1921 and prescribes, inter alia, the procedures and standards for the administrative determinations that are a prerequisite to the imposition of antidumping duties. The act further provides for judicial review of those administrative determinations defining the scope and standard of such review. A significant departure from the old law governing antidumping duty proceedings is found in the judicial review of preliminary administrative determinations as evidenced by the Commission's preliminary determination before this court in the present action.

Except as otherwise specifically cited, all references hereinafter made to the provisions of the Trade Agreements Act of 1979 shall bear the citations to the respective sections of the Tariff Act of 1930, which the former amends.

Italy and Japan of rail passenger cars and parts thereof intended for use as original equipment in the United States, which are allegedly sold at less than fair value, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and, therefore, unlawful under section 516(b)(1)(A) of the Tariff Act of 1930, and (2) make an affirmative determination of a reasonable indication of material injury with respect to the products that were the subject matter of the Commission's investigation.

The administrative proceedings concerning which judicial review is herein sought may be summarized as follows:

On October 16, 1979, plaintiff submitted to the Commissioner of Customs, Department of the Treasury, a "Petition for the Imposition of Antidumping Duties on Rail Passenger Cars from Japan and Italy," pursuant to the Antidumping Act of 1921.

On November 27, 1979, an Antidumping Proceeding Notice was published in the Federal Register advising that a petition in proper form had been received and that after a summary investigation had been conducted a full-scale antidumping investigation was "being initiated for the purpose of determining whether imports of rail passenger cars and parts thereof which are intended for use as original equipment in the United States from Japan and Italy are being, or likely to be, sold at less than fair value within the meaning of the Antidumping Act of 1921, as amended." 45 F.R. 67747 (1979).

No preliminary determinations nor final determinations under the provisions of the Antidumping Act of 1921 as to the question of less than fair value sales had by January 1, 1980, been made by the Secretary of the Treasury in the antidumping cases involving rail passenger cars from Italy and Japan. Accordingly, pursuant to section 102(b) of the Trade Agreements Act of 1979, those cases were forthwith referred to the Commission for determinations of reasonable indications of injury.

On January 14, 1980, a Notice of Institution of Preliminary Antidumping Investigation and Scheduling of Conferences was published in the Federal Register advising that, effective January 1, 1980, the Commission was instituting Antidumping Investigations Nos. 731–TA–5 and 6 (Preliminary), and that the Director of Operations of the Commission had scheduled a conference on January 29, 1980, at which time parties in support and in opposition to the antidumping petition would receive an opportunity to make oral presentations. Written statements of information pertinent to the subject matter of the investigations were to be submitted before February 1, 1980. 45 F.R. 2715 (1980).

On January 29, 1980, a conference was held at which time the respective parties to this action submitted testimony and exhibits. The testimony submitted was not subject to cross-examination.

On February 11, 1980, the Commission made a unanimous negative preliminary determination with respect to the subject matter under investigation, and on February 22, 1980, a notice of "Determination of 'No Reasonable Indication of Material Injury'" was published in the Federal Register. 45 Fed. Reg. 11942 (1980).

On March 24, 1980, the within action was commenced in the United States Customs Court pursuant to section 516A(a)(1)(D), Tariff Act of 1930, by the concurrent filing of a summons and complaint. The proceeding is presently before this court on a motion for summary judgment filed by the plaintiff and a cross-motion for summary judgment filed by the defendant, the United States, and the intervenors parties-in-interest.[2]

In the review of the negative preliminary determination of the Commission by this court, the scope thereof encompasses only the information before the Commission at the time the determination was made, including any information that has been compiled as a part of a formal record. S. Rep. No. 249, 96th Cong., 1st sess. 248.

The standard of review to be followed by this court has been clearly defined in section 516A(b)(1)(A), Tariff Act of 1930, providing:

> (b) Standards of Review.—
>
> Remedy.—The court shall hold unlawful any determination, finding, or conclusion fund—
>
> (A) in an action brought under paragraph (1) of subsection (a),to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or * * *.

Legislative history evidences the intent of Congress with respect to the criteria to be followed by the court in its evaluation of the findings of the Commission:

> Section 516A would make it clear that traditional administrative law principles are to be applied in reviewing antidumping * * * duty decisions were by law Congress has entrusted the decisionmaking authority in a specialized, complex economic situation to administrative agencies. Thus, review of any determination listed in subsection (a)(1) would be to ascertain whether there was a rational basis in fact for the determination by the administrative decisionmaker. S. Rept., supra, at 252.

The application of this standard of review by the reviewing court has been succinctly stated by the U.S. Supreme Court in the case of *Bowman Transportation* v. *Arkansas-Best Freight Systems, Inc.*:

> A reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although this inquiry into

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[2] Under the rules of this court effective November 1, 1980, the time-consuming delay connected with the utilization of the procedure providing for motions and cross-motions for summary judgment can be avoided, thus permitting a more expeditious review by this court in keeping with congressional intent.

> the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. [Citation omitted.] The agency must articulate a rational connection between the facts found and the choice made. [Citation omitted.] While we may not supply a reasoned basis for the agency's action that the agency itself has not given [citation omitted], we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. 419 U.S. 281, 285–6 (1974).

Having recognized the narrow standard by which the court must predicate its review of the Commission's determination in the within action, it is proper that, prior to an evaluation of the specific findings as made by the Commission, we look to the function and obligation of that body in the performance of its investigative prerogatives authorized by the statute:

The preliminary determination by the Commission required by section 733(a) must be "based upon the best information available to it at the time of the determination." Although recognizing the restrictions placed upon an investigation by virtue of a 45-day time limitation, Congress has prescribed a thorough investigation by the Commission prior to the making of its preliminary determination:

> The time limit provided in the bill for an ITC preliminary determination, although longer than that under present law, is still quite brief. It is therefore intended that the ITC will investigate the allegations in the petition in as thorough a manner as possible using the information available within that time period, and will provide interested parties a reasonable opportunity to present their veiws. Such opportunity does not necessarily include a hearing such as that required prior to a final determination. H.R. Rep. No. 317, 96th Cong., 1st sess. 61.

From the provisions of the Trade Agreements Act of 1979, it appears clear that Congress anticipates that the Commission take an active role in obtaining information prior to its determination:

> (b) DETERMINATIONS TO BE MADE ON BEST INFORMATION AVAILABLE.—In making their determinations under [title VII of the Tariff Act of 1930], the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available. Section 776(b).

Congress also has observed that "[t]he nature of the [Commission's] inquiry may vary from case to case depending on the nature of the information available and the complexity of the issues." S. Rept., supra, at 66. Although an initiating petition filed with the administering authority and the Commission pursuant to section 732(a) must be accompanied by information reasonably available to the petitioner

supporting the allegations in the petition, the affirmative obligation and duty of the Commission to conduct a thorough investigation is not relieved thereby. By explanation the House Committee has stated in its report:

> The Committee has long been concerned that petition requirements not be so onerous as to preclude petitioners presenting meritorious complaints from obtaining the remedy provided by law. The Committee therefore intends that no petitioner shall be required to provide information not reasonably available to him. * * * The petitioner will be expected to use reasonable efforts to collect information from public and industry sources. H. Rept., supra, at 60.

The information which reasonably would be available to a petitioner is governed to a great extent by the nature of the proceedings. Congress has recognized that the administrative proceedings under title VII of the Tariff Act of 1930 are investigatory, not adjudicatory. H.R. Rept., supra, at 77; S. Rept., supra, at 100. Accordingly, no procedure has been established by statute nor by regulation promulgated thereto providing for discovery of an opposing party prior to or at the time of the investigation. In the preliminary determination proceedings of the Commission, presently under review in this court, no hearing is required to be provided. A conference may be held by the staff of the Commission at which interested parties may present their views without the opportunity for cross-examination.

The statutory provisions of the Trade Agreements Act of 1979, indeed, clearly express the congressional intent that the Commission will obtain information through its own investigative sources. Section 777 provides for access of interested parties to information both confidential and nonconfidential which has been received by the Commission in connection with its investigation. It specifically requires the Commission, upon request, to inform the parties to an investigation of the progress thereof. Section 777(a)(2). Among the reasons given for the enactment of this section, Congress has referred to the complaint of domestic industries in which they contend that their ability to obtain relief under prior laws has been impaired by their lack of access to the information presented. In light of the investigative posture of the administrative proceedings and the newly enacted judicial review procedure, the need to insure that all interested parties are fully aware of all information presented is imperative. H.R. Rept., supra, at 77. In this connection it is worthy of note that at this stage of the administrative proceedings, the determination of which is herein under review, it is the Commission which has the sole authority to seek both confidential and nonconfidential information from the parties supported by a subpena power granted by statute and provided for in

the Commission regulations. 19 U.S.C. section 1333(a) (1976); 44 F.R. 76470–71 (1979).

Within the scope and standard of the judicial review provided by the Trade Agreements Act of 1979, the court now directs its attention to the record of the administrative proceedings pending before it. Examination thereof clearly indicates the correctness of the Commission's negative finding with respect to the material injury or threat of material injury to an industry in the United States resulting from the importation of finished rail passenger cars. From the record it affirmatively appears that the plaintiff, as the sole active prime contractor dealing in the assembly of rail passenger cars in the United States at the time of the Commission's determination, constitutes this entire industry.

Regulations issued by the Urban Mass Transportation Authority, implementing the "Buy America" provisions contained in the Surface Transportation Assistance Act of 1978, provide (1) that the cost of the domestic components of a product, involved in a project in excess of $500,000, must exceed 50 percent of the cost of all its components, and (2) that the final assembly of the components to form the end product must take place in the United States. 49 CFR 660.22 (1979). The unrebutted evidence in the record discloses that in the Washington contract, the instrument itself included the stipulation that the "Buy America" provision would be complied with. In the Cleveland contract, executed prior to the enactment of the "Buy America" provisions, the final assembly of the rail passenger cars was expressly agreed to be performed within Cuyahoga County, Ohio, United States. The record further discloses that Breda will use approximately 45 percent of American components and parts in the final assembly. The plaintiff in its original petition to the Commissioner of Customs, Department of the Treasury, has acknowledged that in the Southeastern Pennsylvania Transportation Authority (SEPTA) contract, although not a part of the record before this court, and presumably not examined by the Commission, compliance with the regulation relating to the Buy America provisions had been specifically agreed to.[3]

It would thus appear that the challenge of the petitioner to the findings of the Commission that there is no reasonable indication of material injury or threatened material injury to an industry in the United States by reason of the importation of finished rail passenger cars is without merit. Where in connection with the three contracts aforereferred to, it affirmatively appears without contradiction from the contract provisions or from supplementary testimony that the

[3] *Washington Contract:* Administrative Record—Public Documents Transmitted to the U.S. Customs Court (Public Documents) No. 33(6), Amendment No. 9 to Invitation for Bid No. IFB–C–295 at BF–5.
*Cleveland Contract:* Public Document No. 33(7d) at 9; Public Document No. 30 at 91–92.
*Reference to SEPTA Contract:* Public Document No. 33(4) at 12.

assembly of the respective rail passenger cars will be made in the United States, incorporating a significant percentage of the U.S.-made parts and components, a finding by the Commission that a material injury or threat of material injury exists to the rail passenger car industry by virtue of the importation of finished rail passenger cars from Italy and Japan would have been not only directly contrary to the undisputed evidence, but, indeed, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In the opinion of this court, however, the thrust of plaintiff's challenge to the Commission's negative determination with respect to its petition for the initiation of an antidumping duty investigation is misplaced. Only negligible attention has been given by the plaintiff, the intervenors parties-in-interest and by the Government to the allegations contained in the petition with respect to the material injury or threat thereof to an industry in the United States by reason of the imports from Italy and Japan consisting of components and parts of the rail passenger cars. Nor does it appear from the record before the court that the Commission has made a thorough investigation required of it by statute with respect to:

> (1) the sources, volume and prices of the components and parts contemplated to be imported in connection with the contracts in question;
>
> (2) the domestic suppliers of like components and parts in the United States; and
>
> (3) the material injury or threat of material injury resulting thereto by reason of such importations.

From the findings of fact and the administrative record before the court, it would appear that there has been a lack of diligence by the Commission in seeking information available to it in the absence of such evidence having been presented by any of the parties to the investigative proceedings. The Commission, having in findings Nos. 3 and 4 recognized that the prime contractors intended to import certain components and parts of rail passenger cars in the performance of the three contracts in question, seeks to justify its abstention from any further investigative responsibility by the adoption of finding No. 5 providing:

> The Commission sought, but neither the petitioner nor any domestic manufacturer of car body shells and parts for truck assemblies came forward with any specific information or even allegations concerning the quantity or value of imported components. The only specific information available to the Commission at this time is that there have been no imports of these components by either respondent. (Staff report, p. A–8; transcribed staff briefing, conference transcript at 77, 100).

In support of the Commission's apparent position, defendant and intervenors parties-in-interest have urged in their memorandum briefs to this court that upon the plaintiff, as petitioner, rests the burden of proof of all facts necessary to establish a reasonable indication of a material injury or threat thereof. No reference to any burden of proof is contained in the Trade Agreements Act of 1979, nor in the House Committee Report, nor in the Statement of Administrative Action thereon. The sole reference made thereto is contained in the Senate Committee Report wherein the "reasonable indication" standard of the statute is explained:

> The committee intends the reasonable indication standard to be applied in essentially the same manner as the reasonable indication standard under section 201(c)(2) of the Antidumping Act has been applied. The burden of proof under section 733(a) would be on the petitioner. S. Rep., supra, at 66.

Whatever significance the foregoing statement should receive, it is manifest that the term "burden of proof" used in an investigative proceeding does not have the same meaning as when used in an adjudicatory proceeding. Clearly, in the latter instance the bearer of this burden would have a more extensive means of obtaining information to satisfy that burden.

It is the opinion of this court that the oblique reference to burden of proof contained solely in the Senate Committee Report can neither qualify nor minimize the duties or obligation imparted by the explicit language of the statute and the legislative history charging the Commission to make its preliminary determination based upon the best information available. It must be emphasized that this mandate does not limit the best information available to that furnished by the petitioner or by any party-in-interest to the proceedings. The term "available" as used in the statute must be construed in accordance with its common meaning. In so doing, it is clear that all information that is accessible or may be obtained, from whatever its source may be, must be reasonably sought by the Commission.[4] It is only in this manner that the Commission can comply with the intended congressional mandate to conduct a thorough investigation.

Turning to the findings of fact made by the Commission in support of its negative determination, the court confesses it has encountered difficulty in ascertaining the basis of the Commission's determination as well as in ascertaining the connection between the findings adopted and its negative determination.

The Statement of Administrative Action proposed to implement the Trade Agreements Act of 1979 advises that "[a] written statement of the reasons for the Commission's decisions on all material

[4] Webster's Third International Dictionary (1966).

issues of law or fact presented shall be available to the parties and the public." Statement of Administrative Action at 27.[5] The importance of a statement of reasons given in support of an administrative determination has been clearly recognized by the Supreme Court in the case of *Securities and Exchange Commission* v. *Chenery*, 322 U.S. 194, 196 (1947):

> [A] reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.
>
> We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Inasmuch as the Commission has not delineated any statement of reasons, the court in a review of its administrative determination can look only to the findings of fact and conclusions of law adopted by the Commission. Indeed, an independent examination of the record, in the absence of any explicit statement of reasoning, leaves the court in a quandary as to the basis of and theory underlying the Commission's findings of fact and resulting determination.[6]

The Commission makes a finding that the future delivery of parts to be used in the assembly of the rail passenger cars is speculative as to their sources and prices (Finding of Fact No. 7). It further finds that the actual sources for nearly all of the parts which the respondents intend to import for use and assembly of rail passenger cars could be domestic "because of the long lead times on delivery of finished rail cars." (Finding of Fact No. 4). In the opinion of the court, the administrative record indicates on the contrary, that the sources of components and parts were largely determinable. The record contains the statement of Breda that it intends to import car

[5] H.R. Doc. No. 153, part II, 96th Cong., 1st sess. 415 (1979). The Statement of Administrative Action was expressly approved in section 2 of the Trade Agreements Act of 1979.

[6] The court has taken note that the findings of fact adopted by the Commission in the subject proceedings are in marked contrast to the findings adopted in other unrelated proceedings conducted by the Commission under the Trade Agreements Act of 1979 in which the reasoning of the Commission has been set forth with specificity and clarity.

body shells and truck assemblies for use in connection with the Washington contract. The record likewise reveals that in its technical proposal, accompanying its bid on and incorporated in the Washington contract, Breda specifies in writing that it will build car bodies and trucks at their plant in Italy.[7] Clearly, by its failure to recognize this contractual provision, included as a part of the administrative record, the Commission cannot be said to have based its finding on the best information available.

The record further discloses that with respect to the Cleveland contract, executed in February of 1978, it was agreed that within days after the execution of the agreement, Breda and the Greater Cleveland Regional Transit Authority would meet in order to select an approved list of component suppliers.[8] Again, this court is supplied with no information as to whether the Commission sought from either the Greater Cleveland Regional Transit Authority or Breda the list of approved suppliers that were thus selected.

In connection with the Southeastern Pennsylvania Transportation Authority (SEPTA) contract, the record further discloses that the attorney for Nissho-Iwai at the public conference conducted by the Commission staff appeared with a document which the attorney identified as containing the names of suppliers. Although the attorney indicated his wish not to make this document an exhibit in view of its presumed confidential nature,[9] the record indicates no effort on the part of the Commission to procure the same either by way of a formal request or by the utilization of its subpoena power. It would appear self-evident that this very document may have proved valuable with respect to determining the source of components in connection with the contract in issue and undoubtedly may have provided such information sufficient to clarify the speculation which apparently existed in the mind of the Commission as evidenced by finding of fact No. 7. It is particularly noted that no contract documents in connection with the SEPTA contract were forwarded to this court as a part of the record. Accordingly, it is presumed that the Commission did not have the same before it when it made its determination.

In finding of fact No. 5, afore-quoted in full, it is stated that: "[t]he Commission sought but neither the petitioner nor any domestic manufacturer of car body shells and parts for truck assemblies came forward with any specific information or even allegations concerning quantity or value of imported components." Although the components and parts in question may be imported into this country at a future date, to be utilized in the assembly of rail passenger cars of which

[7] Public Document No. 33(6) (Technical Proposal MS 107) at 1-1.
[8] Public Document No. 33(7d) at 5-7.
[9] Public Document No. 30 at 77.

the intervenors parties-in-interest are the prime contractors, the record discloses no information that the Commission sought from these very parties-in-interest the quantity or value of such components and parts that will be imported into the United States. The failure of the Commission to seek such information from the intervenors parties-in-interest, appearing in person before it, becomes even less understandable when, contrary to what the Commission has stated in finding of fact No. 5, plaintiff, Budd, has made specific allegations in its initiating petition with regard to the quantity and value of the parts that will be imported in connection with the SEPTA and Washington contracts.[10]

In findings of fact Nos. 8–12 the Commission, pursuant to its statutory obligations, considers the impact of imports on domestic producers of like products. From the foregoing findings it would appear that the Commission has erred in its concept as to the appropriate domestic industry upon which an impact of injury may be assessed. Section 771(4)(A) defines industry:

> (A) IN GENERAL.—The term "industry" means the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.

In section 771(4)(D), the statute provides for the determination of those domestic products to be considered in assessing the material injury or threat thereof by reason of the imports in question:

> (D) PRODUCT LINES.—The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permit the separate identification of production in terms of such criteria as the production process or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

In the absence of having ascertained in its investigation the identity of the domestic producers of the components and parts in question as well as the percentage share of the total domestic market for these components made by various producers, including the plaintiff, Budd, the findings adopted by the Commission provide this court upon its

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[10] Public Document No. 33(4) at tables 9–12.

Although Budd made no specific allegations in its initiating petition concerning the impact of components imported as "spare parts," pursuant to the contracts in question, this court questions the reasoning of the Commission in presumably not investigating such an impact, particularly in light of the provisions in the Washington contract specifying the per unit prices of spare parts which Breda recommended, and a date certain (falling in early January 1980) by which the transit authority would determine such quantities it would purchase. Public Document No. 33(6), invitation No. IFB–C–295: Spare parts; Public Document No. 33(6) Amendment No. 9 to invitation for bid No. IFB–C–295 at IFB–15.

review no rational basis upon which the negative determination of the Commission can be thereby predicated.[11]

In summary, it is the opinion of the court that the Commission has not conducted a thorough investigation with respect to the allegations by the plaintiff that the importations of components and parts of rail passenger cars materially injure or threaten to materially injure a domestic industry. It has been acknowledged by the Commission that such allegations are and have been within the scope of its investigation from the initiation thereof.

The court is not unmindful of the time limitation placed upon the Commission by statute in its investigation prior to the making of its preliminary determination. Notwithstanding the pressure of time, however, the court cannot determine that the Commission has adopted its findings of fact on a rational basis where, in adopting the finding that the quantity or value of imported parts in connection with the contracts in question are speculative, the record fails to disclose a proper effort by the Commission in the investigative proceedings to seek such information from the prime contractors involved, who, at all times, were before the Commission as respondents parties-in-interest. Nor can the court ascertain any rational basis for the finding of the Commission that the sources of all components and parts under the contracts in question may be domestic where no apparent attention was given to the Washington contract in which it expressly appears in writing that the components and parts under investigation are to be produced in Italy.

Neither has the Commission conducted a thorough investigation commensurate with congressional intent, nor has it sought the best information available as required by statute.

In view of the foregoing, the court is compelled to remand the instant proceedings to the Commission for further consideration of that nformation presently included in the administrative record as well as the best information which would have been available at the time of the original investigation and which might have been obtained from the intervenors parties-in-interest and the domestic industry relating to: (1) The sources and prices of the components and parts for the rail passenger cars to be imported into the United States in connection with the contracts in question herein, and (2) the impact upon the relevant industry by reason of such imports. Within a period of 30

[11] In a colloquy between a member of the Commission and a senior investigator, it is evidenced that no information was sought nor received by the Commission from other domestic companies which formerly had produced rail passenger cars in the United States as to what components and parts, if any, they presently produce. Nor was any communication had between the Commission and any other domestic producers of the components and parts in question (Public Document No. 63 at 5, 7), notwithstanding that the record discloses the identity of certain domestic producers of such components and parts. Public Document No. 33(6), Amendment No. 9 to Invitation for Bid No. IFB-C-295 at IFB-3; Public Document No. 33(2) at figures 17, 18.

days from the date of entry of this order, the Commission shall supplement its present findings of fact by the adoption of such additional findings and resulting conclusions of law as may be warranted, and upon further consideration of its determination, as might be necessitated thereby, submit all of the foregoing to this court.

Accordingly, the within action is remanded for further proceedings not inconsistent with this opinion.

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(Slip Op. 80–16)

ROYAL BUSINESS MACHINES, INC., PLAINTIFF *v.* UNITED STATES, PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE; ROBERT E. HERZSTEIN, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE, DEPARTMENT OF COMMERCE; ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS, LOS ANGELES, CALIF., DEFENDANTS; SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, INTERVENOR

*Decision and Order*

Court No. 80–11–00056

(Dated December 29, 1980)

*Rode & Qualey* for the plaintiff (*Michael S. O'Rourke* and *Patrick Gill* of counsel).
*Richard F. Treacy, Jr.*, Assistant General Counsel for the plaintiff.
*Alice Daniel*, Assistant Attorney General, for the defendants (*Velta A. Melnbrencis* of counsel).
*Eugene L. Stewart* for the intervenor (*Terence P. Stewart* of counsel).

WATSON, Judge: Plaintiff, the importer of a typewriter known as the Royal Administrator, brought this action on November 18, 1980, pursuant to 5 U.S.C. 702 [1] and 28 U.S.C. 1581(i) [2] asking the Court

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[1] § 702. *Right of review.*
A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof * * *

[2] § 1581. *Civil actions against the United States and agencies and officers thereof.*

* * * * * * * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

to exercise its power under 28 U.S.C. 1585 [3] and 2643(c)(1) [4] to enjoin defendants from retroactively modifying the antidumping duty order of May 9, 1980,[5] to include the Royal Administrator typewriter and further asking the court to direct the appropriate officials to liquidate entries of the typewriter and cancel the antidumping bonds which had been required on entries of that typewriter. A temporary restraining order was issued and was extended until the hearing on

[3] § *1585. Powers in law and equity.*

The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

[4] § *2643. Relief.*

* * *

(c)(1) Except as provided in paragraphs (2), (3), of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders, remand injunctions, and writs of mandamus and prohibition.

[5] Antidumping Duty Order.

19 CFR PART 353

PORTABLE ELECTRIC TYPEWRITERS FROM JAPAN; ANTIDUMPING DUTY ORDER

AGENCY: U.S. Commerce Department.

ACTION: Antidumping Duty Order.

SUMMARY: This notice is to inform the public that separate investigations conducted under the Antidumping Act, 1921, and its superseding legislation, the Tariff Act of 1930, as amended, by the Commerce Department, the Treasury Department and the U.S. International Trade Commission have resulted in determinations that portable electric typewriters from Japan are being sold at less than fair value and that these sales are materially injuring an industry in the United States. All unappraised entries of this merchandise made on and after January 4, 1980, the date on which liquidation was suspended, will be liable for the possible assessment of special dumping duties. Deposits of estimated antidumping duties shall be required of all entries made on and after the date of publication of this antidumping duty order in the Federal Register.

EFFECTIVE DATE: May 9, 1980.

FOR FURTHER INFORMATION CONTACT: Steven Lim, Office of Investigations, International Trade Administration, U.S. Commerce Department, 14th St. and Constitution Avenue NW., Washington, D.C. 20230; telephone: 202-377-1776.

SUPPLEMENTARY INFORMATION: Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)) gave the Secretary of the Treasury responsibility for determining whether imported merchandise is being sold at less than fair value. Pursuant to that authority, the Secretary of the Treasury tentatively determined that portable electric typewriters from Japan are being sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921 (19 U.S.C. 160 a)). (Published in the Federal Register of January 4, 1980 (45 F.R. 1220-2).) Pursuant to section 102(b)(2) of the Trade Agreements Act of 1979 (93 Stat. 189, 19 U.S.C. 1671) the tentative determination of the Secretary of the Treasury under the 1921 Act, was treated as a preliminary determination under section 730(b) of the Tariff Act of 1930, as amended (93 Stat. 163, 19 U.S.C. 1673b(b)) (the Act). Pursuant to section 735(a) of the Act (93 Stat. 169, 19 U.S.C. 1673d(a)), the administering authority made a final determination that portable electric typewriters from Japan are being sold at less than fair value. (Published in the Federal Register of March 21, 1980 (45 F.R. 18417-8).)

Section 735(b) of the Act (93 Stat. 170, 19 U.S.C. 1673d(b)), gives the U.S. International Trade Commission responsibility for determining whether by reason of such sales at less than fair value a domestic industry is being or is likely to be materially injured. The Commission has determined, and on May 1, 1980, it notified the Secretary of Commerce that an industry in the United States is materially injured by reason of the importation of portable electric typewriters from Japan that are being sold at less than fair value within the meaning of the Act.

In accordance with section 736 of the Act (93 Stat. 172, 19 U.S.C. 1673e), Customs officers are directed to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the U.S. price of the merchandise for all entries subject to the "Withholding of Appraisement" notice published in the Federal Register on January 4, 1979 (45 F.R. 1220-2) and all future entries until further notice. On or after the date of publication of this notice, Customs officers shall require, at the same time as estimated normal Customs duties on the merchandise are deposited, a deposit of estimated antidumping duties pending liquidation of entries of the subject merchandise on all entries, or withdrawals from warehouse, for consumption. Deposits shall be collected in the following amounts: Nakajima All: 4.36

the preliminary injunction on December 16, 1980, at which time an extension until December 30, 1980 was consented to.

Defendants have moved to dismiss for lack of jurisdiction and for summary judgment. The Smith-Corona Group, Consumer Products Division, SCM Corp., (hereinafter, SCM) was allowed to intervene and filed a motion to dismiss. SCM, a domestic manufacturer of typewriters, was the petitioner in the administrative proceeding of which the May 9th final order was an outgrowth.

At the hearing on plaintiff's motion for a preliminary injunction, responses to all pending motions were filed, following which some additional filings, mandatory and voluntary, were made.[6] Based upon all these papers and proceedings the court summarizes the history of this dispute as follows:

> On April 9, 1979, SCM filed a petition with the Commissioner of Customs for the initiation of an antidumping proceeding under 19 U.S.C. 160(c)(1979) (Current version at 19 U.S.C. 1673a(b)(1)). The Royal Administrator typewriter was included, among others, as the object of the petition. On May 18, 1979, the Treasury Department published a notice of the initiation of an investigation of whether the typewriters were being sold at less than their fair value (44 F.R. 29191). On November 15, 1979, it published notice of an extension of the investigation (44 F.R. 65853). On December 28, 1979, it then issued a notice of the withholding of the appraisement of the typewriters based on its tentative determination that they were being sold at less than their fair value. (45 F.R. 1220).

Thereafter, on January 1, 1980, the new antidumping law (contained in the Trade Agreements Act of 1979, Public Law 91-39) became effective; on January 2, 1980, the Treasury Department's

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percent ad valorem; Silver Seiko: 36.53 percent ad valorem; Brother Industries: 48.70 percent ad valorem; for any other exporters of the subject merchandise: 37.12 percent ad valorem.

I hereby make public these determinations, which constitute an antidumping duty order with respect to portable electric typewriters from Japan.

For the purposes of this notice, the term "portable electric typewriters" are those provided for in item 676.0510, Tariff Schedules of the United States Annotated.

Accordingly, annex I, part 353 of the Commerce Regulations (19 CFR Part 353, 45 F.R. 8208) is being amended by adding the following to the list of antidumping duty orders currently in effect:

| Merchandise | Country | Treasury decision |
|---|---|---|
| Portable electric typewriters | Japan | (45 FR——) |

(Section 736 of the Act (93 Stat. 172, 19 U.S.C. 1673e), and Sec. 353.48 of the Department of Commerce Regulations (19 CFR 353.48, 45 F.R. 8204))

Dated: May 6, 1980.

JOHN D. GREENWALD,
*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 80-14388 Filed 5-8-80; 8:45 am]

[6] On Dec. 19, 1980, defendants filed a letter requested by the court (discussed infra as court exhibit No. 1) and a letter-brief. Plaintiff filed a letter-brief with attachments on Dec. 23, 1980.

responsibility for the administration of that law was transferred to the Commerce Department by the President's Reorganization Plan No. 3 of 1979 (44 F.R. 69275 and 45 F.R. 9931) and on January 4, 1980, the Commerce Department referred the proceeding to the International Trade Commission for determination under 19 U.S.C. 1673d (Sec. 735 of the Tariff Act of 1930, as added by title I of the Trade Agreements Act of 1979) of whether a U.S. industry was being materially injured. Notice of the injury investigation was published by the ITC on January 17, 1980 (45 F.R. 3401).

On March 21, 1980, the Department of Commerce published a final determination under 19 U.S.C. 1673d(a) that the typewriters involved were being sold at less than fair value (45 F. R. 28416) and the ITC followed on May 7, 1980 with the publication of its final determination under 19 U.S.C. 1673d(b), that the sales were causing material injury to an industry in the United States. (45 F.R. 30186.)

The final determination of sales at less than fair value was directed to portable electric typewriters and made plain from its statement of reasons that the product of Silver Seiko, the manufacturer of the typewriter at issue, was included.

The final injury determination by the ITC specifically concluded that: "[T]he Royal Administrator * * * is appropriately considered a portable electric typewriter for the purposes of this investigation."

On May 9, 1980, the Department of Commerce published a Final Antidumping Duty Order (45 F.R. 30613) under the authority of 19 U.S.C. 1673e.[7] It directed Customs officers to assess antidumping duty against the merchandise subject to the previous withholding of appraisement and all future entries and to require the deposit of estimated antidumping duties on all the affected entries. The order was directed to portable electric typewriters and defined the term by reference to item 676.0510 of the Tariff Schedules of the United States, a statistical extension (for portable typewriters) of the TSUS item 676.05, covering all typewriters.[8] The description in the final order used the general language by which the subject of the administrative proceeding had been identified from the inception of the investigation.

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[7] See note 5, supra.

[8] Cf:

| Item | Stat. Suffix | | |
|---|---|---|---|
| | | Typewriters not incorporating a calculating mechanism: | |
| 676.05 | | Non-automatic with hand-operated keyboard | free |
| | | Portable: | |
| | 10 | Electric | |
| | 30 | Nonelectric | |
| | | Other: | |
| | 40 | Electric | |
| | 60 | Nonelectric | |

Plaintiff had steadfastly argued before the Commerce Department and the ITC that the Royal Administrator was not a portable typewriter. During the pendency of the investigations it assertedly received some encouragement on that point from the national import advisory specialist of the Customs Service and had been permitted by the Customs Service to make a few of its entries under a nonportable statistical number.

Following the publication of the antidumping duty order, plaintiff continued to press its cause before the Department of Commerce in a 27-page letter of May 30, 1980.[9] The Department of Commerce forwarded that letter with a request for the advice of the Customs Service as to the proper classification, inter alia, of the Royal Administrator, and stated that "[i]f the models in question are classified under item 676.0540, TSUS, [nonportable] they would not be within the scope of our antidumping duty order and would not be subject to antidumping duties." [10]

On August 7, 1980, the Customs Service sent its determination to the Department of Commerce including holdings to the effect that the Royal Administrator was an electric typewriter within statistical item 676.0540 [nonportable] and was therefore removed from the scope of the antidumping order and the finding of material injury.[11]

Thereafter, the Commerce Department evidently took the view that the Royal Administrator was included in its final antidumping duty order and, according to plaintiff, was about to issue a directive to that effect which Commerce termed "clarifying", but which plaintiff believed would place it under the antidumping order for the first time.[12]

In an affidavit accompanying defendant's motion for summary judgment, the Commerce Department takes the position that it has the responsibility and the authority to determine whether the Royal Administrator " * * * remains within the scope of the May 9, 1980, antidumping duty order" and has not yet made a determination of its position with respect to that question.[13]

[9] Exhibit S to Intervenor's memorandum.

[10] Court exhibit 1—letter of undecipherable date from Leonard M. Shambon, Director, Office of Compliance, International Trade Administration, U.S. Department of Commerce to Salvatore E. Caramagno, Director, Classification and Value Division of the Customs Service.

[11] Letter from Caramagno to Shambon. Exhibit F to plaintiff's memorandum in support of motion for preliminary injunction and writ of mandamus.

[12] Affidavit of Michael S. O'Rourke, Esq., attached to plaintiff's application for a temporary restraining order of Nov. 18, 1980.

[13] Affidavit of John O. Greenwald, Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce.

Counsel for the Government, in oral argument and in a letter-brief filed thereafter, attempted to limit the views expressed in the affidavit to the assertion of a power to clarify. However, counsel for the Government also offered the argument that if a modification changes the scope of a final antidumping duty order to include or exclude merchandise "* * * The order has the effect of a final determination and order" and would be judicially reviewable under 19 U.S.C. 1516a either as a review of a final determination or "* * * in the

(Continued)

The above brief history demonstrates what appears to be some confusion in the administration of the antidumping law, particularly with regard to the role of the antidumping duty order of 19 U.S.C. 1673e.[14]

SCM looked to the antidumping duty order as a clear final expression of the result of the previous less than fair value and injury determinations.

Plaintiff looked to the order as an indication that its typewriter was not included therein and further believed that this was the equivalent of not being aggrieved by any final agency determination. Accordingly, it did not commence the action for judicial review provided for in 19 U.S.C. 1516a(2)(B). Instead, in its view, it pressed the Department of Commerce to confirm the fact that its typewriter had not been included in the order.

The Department of Commerce evidently looked at the order as a malleable medium for expressing its own concept of the result of the previous administrative determinations, or as something within its authority to later modify.

The Customs Service evidently thought that, by virtue of its authority and expertise in matters of classification, (or at least as a result of the request for advice from Commerce) it could influence the interpretation or enforcement of the order.

All these views were mistaken to one degree or another. To a certain extent some confusion is understandable in the early phases of the administration of a law which is complex in its operation, demanding in the coordinated relationship it requires between three independent agencies, and particularly difficult for the way the

(Continued)

context of a civil action which contests either an early or a periodic duty determination." [19 U.S.C 1673e(c) or 19 U.S.C. 1675].

This argument first ignores the clear, albeit erroneous, import of the affidavit, and then strains to make judicial review under 19 U.S.C. 1516a the exclusive vehicle in all cases involving antidumping duties, ignoring the more direct use of 5 U.S.C. 702 and jurisdiction of 28 U.S.C. 1581(i) for those aggrievements for which 19 U.S.C. 1516a is not adequate. See H. Rept. 96-1235, 96th Cong., 2d sess. 48 (1980). See also, discussion of antidumping duty order in text, infra.

[14] § *1673e. Assessment of duty.*

(a) Publication of antidumping duty order.—Within 7 days after being notified by the Commission of an affirmative determination under section 1673(b) of this title, the administering authority shall publish an antidumping duty order which—

(1) directs Customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the U.S. price of the merchandise, within 6 months after the date on which the administering authority receives satisfactory information upon which the assessment may be based, but in no event later than—

(A) 12 months after the end of the annual accounting period of the manufacturer or exporter within which the merchandise is entered, or withdrawn from warehouse, for consumption, or

(B) in the case of merchandise not sold prior to its importation into the United States, 12 months after the end of the annual accounting period of the manufacturer or exporter within which it is sold in the United States to a person who is not the exporter of the merchandise.

(2) includes a description of the class or kind of merchandise to which it applies, in such detail as the administering authority deems necessary, and

(3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandati are deposited.

Department of Commerce is given decisional authority at some stages and denied it at others.

Nevertheless, the statutory scheme, as it bears on this dispute, is clear. The rights of the affected parties, the authority of the agencies, and their relationship are all precisely delineated.

To begin with, the issuance of a final antidumping duty order is purely a ministerial act. It is not the final expression of the administrative determinations. The final order is really the first step in the enforcement of the consequences mandated by statute when it has been determined that certain articles are being sold at less than their fair value and are materially injuring a domestic industry. It is the first step in the mandatory assessment of antidumping duty.[15]

It follows that plaintiff had no more reason to concentrate on the final order and believe itself unaggrieved than a judgment debtor has to think that a questionable execution removes it from a judgment.[16] It further follows that the final order must express the result of the previous determinations without alterations and neither the Commerce Department, as the administering authority, nor the Customs Service, by exercise of its classification authority, could legally change the results of the less than fair value and injury determinations or

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[15] The importance placed by the legislature on the speedy and certain assessment of antidumping duties was the controlling reason for the strict terms of sec. 736 of the Trade Agreements Act of 1979 (19 U.S.C. 1673e.)

In its report, the Committee on Ways and Means stated as follows:

> The committee is very dissatisfied with the past record of the Secretary of the Treasury in assessing duties on entries subject to a dumping finding. Unless dumping duties are assessed in a timely fashion, the remedial effect of the law is negated * * *
>
> * * * * * * *
>
> The bill does not contain a provision specifically related to the collection of antidumping duties following an assessment. The Committee expects that its clear intent to expedite the entire antidumping proceedings should be carried out with respect to collection, since to do otherwise would negate the effect of the statute. In this connection, the Committee intends that the Authority shall act vigorously to collect dumping duties, using all means at its disposal to ensure timely collection. The Committee expects the Authority to devote sufficient resources to the collection process to ensure expeditio[u]s payment of antidumping duties.
>
> H. Rept. 96-317, 96th Cong., 1st sess. 69, 70, 71 (1979).

These sentiments were echoed in the report of the Senate Finance Committee which stated as follows:

> * * * [T]he committee intends that antidumping duties be collected expeditiously. This will reduce the uncertainty which prevails during suspension of liquidation for both the importer and the domestic industry. In light of the dismal performance of the Department of the Treasury in assessing special dumping duties in the recent past, the committee considers this time limit on assessment to be an extremely important addition to the law.
>
> S. Rept. 96-249, 96th Cong., 1st sess. 76, 77 (1979).

All this points to the final order as a ministerial act which must be accurately and promptly performed so that the assessment of duties may be accomplished.

The modicum of authority given to Commerce in 19 U.S.C. 1673(a)(2) to describe the class or kind of merchandise to which the order applies "* * * in such detail as [it] deems necessary * * *" does not permit alteration of the determinations. In practice, what Commerce deems necessary should not be less detailed than the determinations themselves, particularly where the possibility of confusion exists.

[16] As a ministerial act, the failure of the final order to effectuate a determination adverse to plaintiff, if that was the case, was of no moment. If however, the final order was subjected to the standards required of final administrative decisions it would probably be invalid as lacking the necessary clarity. Cf. *ABC Air Freight Co.* v. *Civil Aeronautics Board*, 391 F. 2d 295 (CA2 1968); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962).

modify the facts or legal conclusions on which those determinations depended.

This analysis is supported by the express terms of the statute, which begins in 19 U.S.C. 1673 with an unambiguous statement that the class or kind of merchandise found to have been sold at less than its fair value and to have materially injured a domestic industry must be subjected to an antidumping duty.[17]

Each stage of the statutory proceeding maintains the scope passed on from the previous stage. Thus, the class or kind of merchandise described in the petition, which becomes the subject of investigation under 19 U.S.C. 1673a(c) (2), is the subject of the preliminary injury determination of 19 U.S.C. 1673b, the suspension of liquidation under 19 U.S.C 1673 b(d), the possible terminations or suspensions of 19 U.S.C. 1673c, and the final determinations of 19 U.S.C. 1673d.

In those administrative proceedings even if plaintiff believed itself to be an "orange" among "apples", so long as the Department of Commerce and the ITC were considering it to belong to a certain class it remained so for the purpose of the proceedings.[18] The Court has no doubt that the Royal Administrator was included in the administrative investigations from their commencement until their conclusion in final determinations.

Following the specific ITC injury determination the only legal significance of the final antidumping duty order for plaintiff was as a

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[17] § *1673. Imposition of antidumping duties*

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

[18] The court distinguishes between the authority of the Customs Service to classify according to tariff classifications (19 U.S.C. § 1500) and the power of the agencies administering the antidumping law to determine a class or kind of merchandise. The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service. Within the context of an antidumping proceeding the administering agency, at the proper time, can define the class in its terms.

The Customs Service is placed in a ministerial role by the antidumping law. See, 19 U.S.C. 1673e(a) and 1673h. See also, Reorganization Plan No. 3 of 1979; Report of the Senate Governmental Affairs Committee to accompany S. Res. 245, 96th Cong., 1st sess. 23, 39 (1979). Accordingly, it may not independently modify, directly or indirectly the determinations, their underlying facts, or their enforcement.

The court does not comment on the possibility of Commerce delegating a role to the Customs Service at a time when, and to the extent that, prior to a determination, the class or kind can properly be altered. See generally, *Armstrong Bros. Tool Co.* v. *United States*, 84 Cust. Ct——.C.D. 4848 (1980). After the final determination however, no agencies may review a determination or its underlying facts without specific statutory authority, let alone make modifications. The very strict controls on administrative review of prior determinations, found in 19 U.S.C. 1675(b), are another good indication that Congress did not want these determinations to remain in a state of flux.

signal that the time to bring an action for judicial review of the less than fair value and injury determinations was beginning to run. At that point the aggrievement had occurred by reason of the inclusion of plaintiff's product in the final determinations, the final order could not do less than effectuate the final determinations,[19] and the statutory remedy was available to contest any factual findings or legal conclusions underlying the determinations. 19 U.S.C. 1516a.

Careful examination of 19 U.S.C. § 1516a(2)[20] discloses that, when unrelated material is removed and language inserted in the place of relevant alphabetical references the statute would read as follows:

> Within thirty days after the date of publication in the Federal Register of—
>
> (ii) an antidumping * * * duty order based upon [final affirmative *determinations* by the Department of Commerce that merchandise which was the subject of the investigation is being sold at less than its fair value or by the International Trade Commission that the merchandise is causing material injury to an industry in the United States]
>
> an interested party * * * may commence an action in the Court of International Trade * * * *contesting any factual findings or legal conclusions upon which the determination is based.* [Italic supplied.]

It is plain that the action is directed at the basis of the final determinations and not at the final order. In view of the fact that plaintiff's actual agrievement was inclusion in the final determinations, it should have brought an action under 19 U.S.C. 1516a(2). It follows that a later administrative action, if taken in conformity with those final determinations, could not represent a new aggrievement of plaintiff. Thus, if the Department of Commerce now wishes to clarify and perfect the final order to dispel the confusion which has arisen, it may do so.

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[19] Indeed if by some chance the consequences of the less than fair value and injury determinations were not enforced, it would be the petitioner (Intervenor) who would have a traditional mandamus action to compel the appropriate official to perform ministerial acts.

[20] *§1516a. Judicial review in countervailing duty and antidumping duty proceedings*

(a) REVIEW OF DETERMINATION.—

* * * * * * *

(2) REVIEW OF DETERMINATIONS ON RECORD.—

(A) IN GENERAL.—Within thirty days after the date of publication in the Federal Register of—

(ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Customs Court by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) REVIEWABLE DETERMINATIONS.—The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority and by the Commission under Section 1671d or 1673d of this title.

The analysis of the facts and law requires the Court to dismiss plaintiff's action for lack of jurisdiction, the time within which to bring its action having expired 30 days after publication of the antidumping duty order.

The court notes that the dismissal is not grounded on the basis urged by the defendant, i.e., that the action under 19 U.S.C. 1516a is the exclusive remedy for all grievances arising from the administration of the antidumping law. For this grievance the action under 19 U.S.C. 1516a was an adequate remedy. However, it is not difficult to foresee that certain grievances may arise between the final determinations and the administrative review of the final determinations, under 19 U.S.C. 1675 for which 19 U.S.C. 1516a would be manifestly inadequate. In those instances, the right of action under 5 U.S.C. 702 and the Court's broad residual jurisdiction under 28 U.S.C. 1581(i) will serve to maintain the comprehensive system of judicial review established by the legislature.

For the reasons expressed above, this action is hereby dismissed for lack of jurisdiction.

(Slip Op. 80–17)

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT; AND BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION, AND SILVER REED AMERICA, INC., AND SILVER SEIKO, LTD., PARTIES-IN-INTEREST

Memorandum and Order on Plaintiff's Motion for Injunctive and Incidental Relief, and Party-in-Interest's Cross-Motion to Dismiss.

Court No. 80–9–01343

[Injunctive relief granted; incidental relief denied; cross-motion to dismiss denied.]

(Dated December 30, 1980)

*Eugene L. Stewart* and *Terence P. Stewart*, Esqs., for the plaintiff.

*Alice Daniel*, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, and *Velta A. Melnbrencis*, Assistant Branch Director, Esqs.), for the defendant.

*Tanaka Walders & Ritger*, Esqs. (*H. William Tanaka, Donald L. E. Ritger* and *Wesley K. Caine*, Esqs., of counsel) for Brother Industries, Ltd., and Brother International Corp., party-in-interest.

*Arter, Hadden & Hemmendinger*, Esqs. (*William Barringer* and *Christopher Dunn*, Esqs., of counsel) for Silver Reed America, Inc., and Silver Seiko, Ltd., party-in-interest.

NEWMAN, Judge: Plaintiff, a well known domestic manufacturer of portable electric typewriters (PET's), seeks judicial review of an

"Early Determination of Antidumping Duties" by the International Trade Administration, U.S. Department of Commerce (Commerce), published in the Federal Register on August 13, 1980 (45 F.R. 53853–56). This determination, made pursuant to section 736(c) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144) (19 U.S.C. 1673e(c)), concerns certain PET's from Japan manufactured and imported by the parties-in-interest, Brother and Silver, and entered, or withdrawn from warehouse, for consumption on or after January 4, 1980 to May 7, 1980.[1] Plaintiff predicates subject matter jurisdiction on section 516A(a)(2)(A) and (B)(iii) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1516a(a)(2)(A) and (B)(iii)), raising an issue of novel impression. Under the recently enacted Customs Courts Act of 1980, Public Law 96–417, 94 Stat. 1727, effective November 1, 1980, the Court of International Trade has exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930. 28 U.S.C. 1581(c).

Presently before the court is plaintiff's application under section 516A(c)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1516a(c)(2)), to enjoin the liquidation of the entries that were the subject of Commerce's early determination of antidumping duties pending the final hearing and disposition on the merits of the action. Additionally, plaintiff requests certain incidental relief, which will be discussed infra.

Brother has filed a cross-motion to dismiss for lack of subject matter jurisdiction, which cross-motion is opposed by plaintiff and the Government. Silver does not challenge the court's jurisdiction (Trans. Oral Arg., 71).[2]

## Background

On May 9, 1980 Commerce published an Antidumping Duty Order covering imports of PET's from Japan. 45 F.R. 30618–19.[3] The order provided that all entries of PET's imported from Japan subject to the "Withholding of Appraisement" notice published on January 4, 1980 were liable for possible assessment of antidumping duties. Further, the order directed Customs officers to require a deposit of estimated antidumping duties pending liquidation of entries in the follow-

[1] January 4, 1980 was the date of publication by the Treasury Department of its tentative determination of sales at less than fair value, and the date on which liquidation was suspended (44 F.R. 1220); May 7, 1980 was the date of publication by the International Trade Commission of its affirmative final injury determination (45 F.R. 30188).

[2] On October 14, 1980, oral argument was heard on plaintiff's requested injunctive and incidental relief, and Brother's cross-motion to dismiss.

[3] That antidumping duty order is sub judice in *Nakajima All Co., Ltd.* v. *United States*, Court No. 80-6-00933; and in *Silver Reed America, Inc., et al.* v. *United States*, Court No. 80-6-00934. Plaintiff, SCM, is a party intervenor in both actions.

ing amounts: 36.53 percent ad valorem for Silver, and 48.70 percent ad valorem for Brother.

In lieu of the deposit of estimated antidumping duties, Commerce may permit the posting of a bond or other security for a period not to exceed 90 days from the date of publication of an antidumping duty order. This alternative is available where Commerce is satisfied, based on information presented to it by a manufacturer, producer, or exporter, that it will be able to determine within 90 days of publication date of the order the foreign market value and the U.S. price for all merchandise of such manufacturer, producer, or exporter that was entered, or withdrawn from warehouse, for consumption between the date of publication of the affirmative preliminary less than fair value (LTFV) determination and the date of publication of the International Trade Commission's affirmative final determination. 19 U.S.C. 1673e(c)(1).

The results of Commerce's determination of foreign market value and U.S. price serve as the basis for the assessment of antidumping duties on all entries of the merchandise covered by the determination, viz., entries that were made between publication date of the affirmative preliminary LTFV determination and publication date of the affirmative final injury determination. The results also serve as the basis for the deposit of estimated antidumping duties on future entries of merchandise from the particular foreign interested party. 19 U.S.C. 1673e(c)(3).

In a notice published in the Federal Register on May 30, 1980 Commerce stated that Brother and Silver had requested that the deposit of estimated antidumping duties provided for in the Antidumping Duty Order be waived, and that an early determination of antidumping duties be made. Commerce advised that it was satisfied from the information presented by these two Japanese manufacturers that it would be able to timely make the requisite determination for all entries of merchandise of such manufacturers. 45 F.R. 36464. Commerce further stated (ibid.):

> Accordingly, Customs officers are being directed to waive deposit of estimated duty and accept the posting of a bond or other security for all entries of portable electric typewriters manufactured by Brother Industries and Silver Seiko entered or withdrawn from warehouse, for consumption, from the date of publication of this notice.

The results of the early determination of antidumping duties respecting PET's from Japan manufactured by Brother Industries and Silver Seiko were published in the Federal Register on August 13, 1980. In its notice, Commerce explained the manner of computing the foreign market value and the U.S. price of all entries of the subject merchandise made from January 4, 1980, to May 7, 1980. The results

of the comparisons of foreign market value and the U.S. price were summarized as follows (45 F.R. 53855):

> Margins were found on 74 percent of sales compared. The weighted average margin found with respect to sales by Silver Seiko was 14.91 percent and with respect to sales by Brother was 5.31 percent.

Accordingly, Commerce determined that the U.S. price of Brother and Silver PET's are less than the foreign market values of such or similar typewriters, (ibid.) and then advised:

> Customs officials will be directed to assess antidumping duties equal to the amount determined by the Department during this proceeding for all entries of portable electric typewriters manufactured by Brother and Silver Seiko entered or withdrawn from warehouse for consumption on or after January 4, 1980 to May 7, 1980. (Ibid.)

Additionally, it was announced that Customs officers were being directed to require the deposit of estimated antidumping duties on all PET's from Japan entered or withdrawn from warehouse for consumption. In that connection, Commerce announced: (45 F.R. at 53856):

> The estimated antidumping duty deposit required for entries of the subject merchandise shall be 14.91 percent for Silver Seiko; 5.31 percent for Brother; * * *

Significantly too, the notice of August 13, 1980 stated Commerce's intent that, for purposes of the assessment of antidumping duties on the entries subject to the determination under section 736, the determination constitutes the completion of a review under section 751 of the act which vests in all interested parties the rights flowing from the completion of such a review.

In this action, plaintiff challenges Commerce's allowance of certain adjustments to the foreign market values for Brother's and Silver's PET's, which adjustments were made for the purpose of comparing either the purchase price or the exporter's sales prices, as appropriate with the foreign market values and thereby arriving at the proper antidumping duties to be assessed. The contested adjustments include, inter alia: (a) allowances for differences in Japanese inland freight; (b) allowances for differences in merchandise; and (c) allowances for differences in circumstances of sale, including expenses for packing, rebates, and advertising and the so-called exporter's sales price offset.

The purpose of plaintiff's application is to enjoin the liquidation of entries made on or after January 4, 1980 to May 7, 1980, so that such entries may be assessed with antidumping duties in the proper amounts, as determined by this court. Moreover, plaintiff seeks an order requiring the deposit by Brother and Silver of estimated antidumping duties in accordance with the terms of the antidumping

duty order, respecting all entries, or withdrawals, of the subject merchandise made since January 4, 1980, pending liquidation in conformance with the final decision of this court.

## JURISDICTION

We first consider the threshold jurisdictional issue raised by Brother's cross-motion to dismiss—an issue of first impression.

The nub of Brother's challenge to the court's jurisdiction is that this action seeks review of a determination made under section 736(c) of the Tariff Act, and that under section 516A judicial review is not provided with respect to a section 736(c) determination.[4]

In their opposition to Brother's cross-motion, plaintiff and the Government argue that while section 516A does not specifically list determinations made pursuant to section 736 of the act among those reviewable, an examination of the statutory scheme in its entirety, pertinent legislative history, and the contested determination itself, demonstrate that the court has jurisdiction over this action.[5]

For the reasons advanced by plaintiff and the Government, I have concluded that Brother's jurisdictional challenge is without merit.

Brother's cross-motion to dismiss for lack of subject matter jurisdiction has raised a novel issue, viz., whether the court has jursidiction under section 516A to review an antidumping duty assessment determination made by Commerce prior to the annual review determination required by section 751(a) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979. In light of the anticipated extensive use of section 736(c) in antidumping duty proceedings, the significance of the jurisdictional question cannot be overemphasized.

While there can be no doubt Congress intended that antidumping duty assessment determinations may be reviewable by this Court, admittedly section 516A does not expressly mention section 736 determinations among those set forth as reviewable. Nonetheless, from the legislative history of the Trade Agreements Act of 1979, it is evident that section 736(c) simply authorizes a fast-track section 751(a) review and determination, and therefore an early determination

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[4] Inasmuch as this action was filed and briefs submitted prior to November 1, 1980, effective date of the Customs Courts Act of 1980, the parties have not addressed the question of whether the court's residual jurisdiction under 28 U.S.C. 1581(i) would be applicable in the event that the court should find that the instant action does not fall within the purview of section 516A. See H. Rept. 96-1235, 96th Cong., 1st Sess. 48 (1980); *Royal Business Machines, Inc.* v. *United States, et al.*, 1 CIT ——, Slip-Op. 80-16 (1980). In view of the conclusions reached in this opinion, it is unnecessary to consider that issue.

[5] Interestingly, Brother itself has filed an action challenging Commerce's early determination of August 13, 1980 (Court No. 80-9-01436), but counsel for Brother has characterized that action as "essentially protective in nature, and will be pursued only if this Court * * * finds [that it has] jurisdiction". (Brother's memorandum, at 7, footnote 2.)

Contemporaneously with this application and order, I have granted Brother's application for consolidation of the instant action with Court No. 80-9-01436.

of antidumping duties pursuant to section 736(c) is reviewable as a section 751(a) determination.

Congressional intent that an early determination of antidumping duties made under section 736(c) should be also considered as a determination under section 751, is demonstrated by the reports of both committees that were instrumental in drafting the Trade Agreements Act of 1979.

Thus, the "House Ways and Means Committee Report No. 96–317," 96th Cong., 1st sess. (1979) states (page 70):

> Further, the bill provides a limited exception to the requirement of a deposit of estimated duties for importers who have taken steps to eliminate or substantially reduce dumping margins between the date of an affirmative preliminary determination by the Authority and the final affirmative determination by the ITC. Thus, for a three-month period following the issuance of an antidumping order, the Authority may continue to permit entry of merchandise subject to the order under bond for individual importers if it has reason to believe that those importers have taken steps to revise their prices to result in a significantly lower dumping margin. *During this three-month period, the Authority will examine the merchandise entered during the period between its preliminary and the ITC's final determination. If assessment on these entries can be made within the three-month period in accordance with the procedures of section 751, then assessment will take place and the new dumping margins derived from this assessment will serve as the basis for the deposit of estimated duties on future entries.* [Italic added].

Similarly, the "Senate Finance Committee Report No. 96–249," 96th Cong., 1st sess. (1979), commented (p. 75):

> Generally, estimated duty deposits equal to the amount of the estimated antidumping duty would be required to be deposited at the same time as estimated normal customs duty deposits must be made with respect to the merchandise under section 505(a) of the Tariff Act of 1930 (19 U.S.C. 1505). However, the administering authority could permit the importer to post a bond or other security in lieu of estimated antidumping duty deposits for not more than 90 calendar days after the date on which the antidumping duty order is published under certain conditions. *The manufacturer, producer, or exporter of the merchandise would be required to supply the authority sufficient information relating to entries of the merchandise made after the date of the preliminary determination by the authority and before the date of the final determination by the ITC to enable the authority to determine the amount of antidumping duties on that merchandise under section 751(a) of the Tariff Act. If the authority permits the posting of bonds or other security in lieu of estimated duty deposits and makes a determination under section 751, then that determination would be the basis for the assessment of antidumping duties imposed on entries made before the date of the affirmative determination of the ITC.* That determination would also be the basis for the deposit of estimated anti-

> dumping duties on entries of merchandise by the manufacturer, producer, or exporter who supplies the information, made on or after the earlier of the date on which the determination is made under section 751(a) or the 90th day after the date on which the antidumping duty order is published. [Italic added.]

While the principle respecting the strict construction of statutes waiving the sovereign immunity of the United States is well settled,[6] the plain indication of Congressional intent concerning the interplay of section 736(c) and 751(a) cannot be ignored. *Cf. SCM Corporation* v. *United States, Brother International Corp., Party-in-interest,* 80 Cust. Ct. 226, C.R.D. 78–2, 450 F. Supp. 1178 (1978) (Court's jurisdiction to review negative injury determinations in antidumping proceedings gleaned from Congressional intent).

In this case, based upon the information submitted by Brother and Silver pursuant to section 736(c), Commerce first found that it could make an early antidumping duty determination within 90 days after the publication of the antidumping duty order of May 9, 1980. Consequently, on May 30, 1980 Commerce permitted Brother and Silver to post bonds or other security in lieu of estimated dumping duties for merchandise entered, or withdrawn from warehouse, for consumption on or after May 30 and before August 8, 1980. 45 F.R. 36464. Subsequently, Commerce proceeded to determine the foreign market values and United States prices for the merchandise involved. On August 13, 1980 Commerce published its early determination, which not only included a determination of the amount of estimated duties to be deposited regarding future entries, but also included the foreign market values and the United States prices for the merchandise involved, along with certain adjustments to permit their comparison. Plainly, then, Commerce had conducted a review and determination of antidumping duties as provided in section 751. Hence, Commerce correctly observed that its early determination under section 736(c) also constituted the completion of a review under section 751, and expressly so stated in its published determination. 45 F.R. 58355.

In sum, since Commerce made a section 751 determination for purposes of section 736(c)(2), and since section 751 is specifically reviewable pursuant to section 516A, the early antidumping duty determination in this case is reviewable by this court pursuant to section 516A.

Brother's memorandum notes the above cited legislative history, but maintains that it should not be used to create ambiguity in sections 736(c) and 751, which provisions according to Brother are clear on their face, and consist of distinct provisions of law, each section

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[6] See *United States* v. *Boe,* 64 CCPA 11, C.A.D. 1177, 543 F. 2d 151 (1976).

being self-contained and serving its own purpose. Continuing, Brother points out that the introductory language of section 751(a) directs the administering authority to review and determine the amount of any antidumping duty "[a]t least once during each 12-month period *beginning on the anniversary of the date of publication of * * * an antidumping duty order.*" (Italic added.) From this language Brother concludes that by its terms, section 751(a) reviews comprise only those which are initiated after the anniversary date of an antidumping order so that an early antidumping duty determination cannot qualify as a section 751 determination. I am unable to agree with such narrow construction of the statute.

The introductory language in section 751(a) merely mandates the administering authority to make a review and determination of antidumping duties once every 12 months following the anniversary date of the antidumping duty order. It does not preclude the Department from making a section 751 determination at an earlier date. That a section 751 determination, such as made here, could be made during the 90-day period following the publication of the antidumping duty order, as may be noted above, is clearly reflected in legislative history.

Admittedly, on a cursory reading of the statutes the relationship between sections 736 and 751 is not immediately apparent. Nonetheless, upon careful analysis it becomes apparent that section 736(c) is not an independent, self-contained provision, as insisted by Brother, but rather section 736(c) depends for its effectiveness upon section 751(a). Consequently, Congress did not provide for judicial review of section 736(c) determinations for the simple reason that the significant determinations are all made in accordance with section 751(a) procedures, explicitly reviewable under section 516A. Accordingly, the cross-motion by Brother to dismiss this action for lack of subject matter jurisdiction is denied.

## Injunction

We turn to plaintiff's application for injunctive relief pursuant to 19 U.S.C. 1516a(c)(2).

In subsection (c)(1) of section 516A, 19 U.S.C. 1516a(c)(1), Congress provided that unless liquidation is enjoined by the court, entries of merchandise of the character covered by a determination contested under subsection (a) of section 516A shall be liquidated in accordance with the administrative determination, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register of a notice of a decision of the Customs court (renamed U.S. Court of International Trade, effective November 1, 1980), or of the Court of Customs and Patent Appeals, not in harmony with that determination.

In subsection (c)(2) of section 516A, 19 U.S.C. 1516a(c)(2), Congress permitted the Customs court to enjoin the liquidation of some or all entries of merchandise covered by a determination upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances. Under the statute, in ruling on a request for injunctive relief the court must consider, among other factors, whether:

(A) the party filing the action is likely to prevail on the merits,

(B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,

(C) the public interest would best be served if liquidation is enjoined, and

(D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

The foregoing statutory factors have long been recognized by federal courts in granting preliminary injunctive relief. See, *e.g.*, *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F. 2d 921, 925 (D.C. Cir. 1958). See also *Zenith Radio Corporation* v. *United States*, 1 CIT —, Slip Op. 80–10 (1980); and *De Jub Leasing Corp., et al.* v. *United States, et al.*, 1 CIT —, Slip Op. 80–9 (1980).

The entries subject to liquidation with assessment of antidumping duties based upon the early determination published on August 13, 1980, which plaintiff contests in this action, are the entries of PETs manufactured by Brother Industries and Silver Seiko and entered, or withdrawn from warehouse, for consumption from January 4, 1980 to May 7, 1980.

I have carefully considered, among other things, the four factors delineated in the statute, and have concluded that under the facts and circumstances presented herein injunctive relief is warranted respecting the above-mentioned entries.

Plaintiff claims on the merits that Commerce improperly allowed certain adjustments (noted supra) to be made to the homemarket price of each model typewriter such as or similar to an imported model, for the purpose of computing statutory foreign market value. The result of any improper adjustment, of course, would reduce the foreign market value, and thereby diminish the difference between such value and the U.S. price of the imported articles, viz., reduce or eliminate the dumping margin. H.R. Rept. 96–317, 96th Cong., 1st sess. 76 (1979). The merits present a number of highly complex issues which have been but briefly argued by the parties in their memoranda of law submitted to the court in connection with plaintiff's present application. While I have not arrived at a final decision as to the propriety of any or all of the contested adjustments, at

this juncture I have concluded from the arguments presented that plaintiff is likely to prevail on the merits.

Additionally, I find that plaintiff would suffer irreparable harm if liquidation of the entries covered by the early antidumping determination were not enjoined. It appears that in 1980 plaintiff has continued to experience substantial adverse operating results in its PET business, at least partly due to the less than fair value sales by the Japanese manufacturers. To buttress its argument that injunctive relief is necessary to prevent irreparable harm to its PET business plaintiff cites statistics showing that increased imports of PET's from Japan in 1980 over 1979 have captured an additional share of the market this year at the expense of plaintiff. Moreover, plaintiff's statistics demonstrate that plaintiff continues to suffer a decline in: Operating income, return on net sales, production, and U.S. sales. Plaintiff has also shown that its inventories of U.S. produced PET's have substantially increased, and that there has been a continuation of price suppression.

It further appears from an affidavit executed by plaintiff's vice president and general manager that substantial numbers of Japanese made PET's imported earlier this year remain in inventory. Liquidation of the subject entries prior to the final decision in this case would allow any inventoried units to escape the imposition of the correct amount of antidumping duties if plaintiff prevailed on any of the contested adjustments to the foreign market value.

Generally, the public interest is best served by preventing entries subject to assessment of antidumping duties from escaping the correct amount of such duties. This public interest result may be achieved by the procedural safeguard of an injunction pendente lite to maintain the status quo of the unliquidated entries until a final resolution of the merits.

The parties-in-interest argue that granting injunctive relief to plaintiff would restrict competition and enhance plaintiff's potential monopoly position in the PET business. While Brother notes that in 1975 the Antitrust Division of the Department of Justice opposed plaintiff's antidumping petition on antitrust grounds, nevertheless I have also noted with great interest that presently there is not even a suggestion by the Government in its opposition to plaintiff's application that there may be any monopoly or antitrust implication if liquidations are enjoined. Further, Silver's claim that granting injunctive relief would result in higher consumer prices for PET's is purely conjectural.

Finally, I find that any harm to the parties-in-interest that would result from enjoining liquidations (e.g., pricing uncertainty) is substantially outweighed by the harm that would result to plaintiff

if injunctive relief were denied. The existence of the present litigation, as well as the litigation brought by Brother and Silver, make it impossible at this stage to fix with certainty the amount of antidumping duties that may eventually be assessed on merchandise entered after May 7, 1980. Consequently, the cost and pricing uncertainties experienced by the parties-in-interest will continue whether or not this court enjoins the liquidation of entries made before May 7, 1980.

While the court is mindful that Congress intended injunctive relief under section 516A(c) (2) should be regarded as "truly an extraordinary measure and that the relief should not be granted in the ordinary course of events" (S. Rept. 96–249, at 253), under all the facts and circumstances, I find that the requested injunctive relief has been fully justified, notwithstanding the commercial uncertainty relating to the suspension of liquidation. In short, if plaintiff should prevail on the merits, liquidation of the involved entries on the basis of the August 13, 1980 determination would further compound the injury to plaintiff resulting from the less than fair value sales of the Japanese PET's, and such injury would be irreparable.

### Incidental Relief

Last, we come to plaintiff's request for certain incidental relief. Specifically, plaintiff requests this Court to direct that there be collected a deposit of estimated antidumping duties on all PETs' manufactured by Brother Industries and Silver Seiko entered, or withdrawn from warehouse, for consumption on and after January 4, 1980, in the amount of 48.70 percent ad valorem for Brother and 36.53 percent ad valorem for Silver, as specified in the antidumping duty order issued on May 9, 1980.

I agree with Silver's contention that the court lacks authority to direct the deposit of estimated duties in an amount other than ordered by Commerce in the contested determination of August 13, 1980 until after there has been a full review of the merits; and that there should not be any modification of the amount of such deposits as incidental to granting an injunction pendente lite.

To suspend Commerce's determination of August 13, 1980 and order the deposit of estimated duties in the amounts set forth in the Antidumping Duty Order published on May 9, 1980 would, in effect, prejudge the merits of the instant case at this early stage as part of the expedited procedures accompanying an application for a preliminary injunction. What is more, if this court were to require deposits of estimated duties in amounts that are different than those prescribed by the contested determination, the court would effectively be destroying the status quo, which is one of the fundamental purposes of

granting injunctive relief pendente lite. *Cf. Industrial Fasteners Group, American Importers Association* v. *United States*, 85 Cust. Ct. ——, C.R.D. 80–8, 495 F. Supp. 911 (1980); See also S. Rept. 96–249, 96th Cong., 1st sess. 252–253 (1979).

Silver also points out that the rates which plaintiff now seeks as a basis for deposits of estimated duties (viz., those determined in the antidumping order of May 9, 1980) are predicated upon the same categories of adjustments now challenged by plaintiff; and that if plaintiff's claims are sustained on the merits, then the rates now sought would be as unlawful as the rates now challenged.

Finally, Brother calls attention to the fact, undisputed by plaintiff, that the dumping margins determined by Commerce in the original antidumping duty order were based upon exchange rates for the U.S. dollar and the Japanese yen that are no longer applicable.[7]

For the foregoing reasons, plaintiff's requested incidental relief is denied.

Summed up, then, the history of this complex litigation to date is as follows: On April 9, 1979 plaintiff filed a petition with the Treasury Department regarding PET's from Japan pursuant to the Antidumping Act of 1921, as amended (19 U.S.C. 160, et seq.), and identified three Japanese manufacturers of PET's, including the parties-in-interest Brother and Silver. An antidumping proceeding notice was published on May 18, 1979, and a notice of extension of the investigatory period was published on November 15, 1979. Thereafter a withholding of appraisement notice was published on January 4, 1980. According to that notice, Treasury had made a tentative determination of less than fair value (LTFV) sales of PET's from Japan. On January 1, 1980, the Trade Agreements Act of 1979 had become effective. In accordance with section 102(b)(2) of that act, Treasury's tentative determination under the Antidumping Act was treated as a preliminary determination under the new section 733(b) of the Tariff Act of 1930. Pursuant to section 735(a) of the Tariff Act, the administering authority (viz., Commerce) made a final determination, published on March 21, 1980, that PET's from Japan are being sold at LTFV. The Commission, in turn, instituted antidumping investigation No. 731–TA–12 (final) pursuant to section 735 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, to determine whether an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of the LTFV imports from Japan.

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[7] The exchange rates applied in the original order related to the period of investigation into alleged sales at less than fair value, viz., November 1978 through April 1979.

The Commission's Final Determination of Material Injury was published on May 7, 1980, and on May 9, 1980, Commerce published an antidumping duty order respecting PET's from Japan, specifying inter alia, that deposits for estimated antidumping duties would be collected in the following amounts: Silver Seiko, 36.53 percent ad valorem; and Brother Industries, 48.70 percent ad valorem. In May 1980, Brother Industries and Silver Seiko requested that they be permitted to deposit bond or other security in lieu of estimated duties pursuant to section 736(c) of the Tariff Act of 1930. Having satisfied itself that it could make an early determination of the foreign market value and the U.S. price for the merchandise which was entered between January 4, 1980 and May 7, 1980, Commerce waived the deposit of estimated duty in lieu of security pending the early determination. On August 7, 1980, Commerce made its early determination of antidumping duties respecting PET's from Japan, which was published on August 13, 1980. In its early determination, Commerce specified the amount of the deposit of estimated antidumping duties for future entries, viz., 14.91 percent ad valorem for Silver Seiko, and 5.3 percent ad valorem for Brother Industries. Further, Commerce directed that Customs officials should assess antidumping duties equal to the amount determined during the proceeding for all entries of PET's manufactured by Brother Industries and Silver Seiko entered, or withdrawn from warehouse, for consumption on or after January 4, 1980 to May 7, 1980. On September 2, 1980, plaintiff filed a summons in this action contesting the determination of antidumping duty published on August 13, 1980, along with a complaint. The complaint, in substance, challenges various adjustments made by Commerce to the foreign market value of the typewriters. On September 12, 1980, plaintiff filed its application under section 516A(c)(2) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, to enjoin the liquidation of the entries that were the subject of Commerce's early determination of antidumping duties pending the disposition of the merits of the action and for specified incidental relief. As noted herein, the application for injunctive relief is granted; but plaintiff's application for incidental relief is denied.

Accordingly, it is hereby ORDERED:

1. That plaintiff's motion to enjoin the liquidation of entries of portable electric typewriters from Japan on and after January 4, 1980 to May 7, 1980, covered by the early determination of antidumping duties by the International Trade Administration, United States Department of Commerce, published in the Federal Register on August 13, 1980 (45 F.R. 53853–56) is granted.

2. That plaintiff's application for incidental relief is denied.

3. That the cross-motion to dismiss by Brother Industries, Ltd. and Brother International Corporation is denied.

(Slip Op. 80–18)

BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION, PLAINTIFFS *v.* UNITED STATES, DEFENDANT; SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, PARTY-IN-INTEREST

Court No. 80–9–01436

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT, BROTHER INDUSTRIES, LTD., AND BROTHER INTERNATIONAL CORPORATION; SILVER SEIKO, LTD., AND SILVER REED AMERICA, INC., PARTIES-IN-INTEREST

Court No. 80–9–01343

*Memorandum and Order on Motions for Consolidation and Severance*

[Motion for consolidation granted; Motion for severance denied.]

(Dated: December 30, 1980)

*Alice Daniel*, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, and *Velta A. Melnbrencis*, Assistant Branch Director, Esqs.), for the defendant.

*Tanaka Walders & Ritger*, Esqs. (*H. William Tanaka, Donald L. E. Ritger* and *Wesley K. Caine*, Esqs., of counsel) for Brother Industries, Ltd., and Brother International Corporation, party-in-interest.

*Arter, Hadden & Hemmendinger*, Esqs. (*William Barringer* and *Christopher Dunn*, Esqs., of counsel) for Silver Seiko, Ltd., and Silver Reed America, Inc., party-in-interest.

NEWMAN, Judge: Brother Industries, Ltd. and Brother International Corp. (Brother) have moved to consolidate court No. 80–9–01343 (in which Brother appears as a party-in-interest) and court No. 80–9–01436 (in which Brother appears as plaintiff). Silver Seiko, Ltd. and Silver Reed America, Inc. (Silver) oppose consolidation and have cross-moved for severance of court No. 80–9–01343 with regard to Silver in the event this court grants Brother's motion. The Government consents to Brother's motion for consolidation and opposes Silver's cross-motion for severance. Smith-Corona Group, Consumer Products Division, SCM Corp. (SCM) has not responded to either of the pending motions.

For the reasons stated below, Brother's motion for consolidation is granted, and Silver's cross-motion for severance is denied.

Rule 42(a) of the Rules of this Court provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated under a consolidated

complaint; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

In both of the above-captioned actions, plaintiffs challenge the "Early Determination of Antidumping Duties" reached by the International Trade Administration, U.S. Department of Commerce (Commerce) pursuant to section 736(c) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (Public Law 96-39, 93 Stat. 201) (19 U.S.C. 1673(c)) (45 F.R. 53853). The respective plaintiffs in both cases contend that Commerce erred as to various respects in calculating inter alia, the estimated antidumping duties to be deposited in connection with entries of certain portable electric typewriters imported from Japan during the same period of time. Thus, in both cases, the same administrative record and determination are the subjects of this court's review. The court cannot completely determine the correctness of the contested determination without resolving the questions raised in both cases concerning various adjustments to foreign market value, and it is clear that the two actions involve common questions of law or fact.

Silver's cross-motion for severance is without merit. As noted in the memoranda of law filed in connection with SCM's application for injunctive and incidental relief in court No. 80-9-01343, which application is decided contemporaneously with this motion and order,[1] the SCM action raises issues of law which are common to both Brother's and Silver's typewriters. Under these circumstances, it makes sense that the issues be briefed and decided in one consolidated case. Severing the action, as requested by Silver, would result in much needless duplication of effort on the part of SCM, the Government and the court, without commensurate benefit to Silver. While, of course, there may be proceedings in the consolidated case that do not directly affect Silver's interests, by the same token it would appear to be of benefit to Silver to know all that is brought to the attention of the court concerning the contested determination which Silver wishes to defend respecting its own typewriters. If there are any matters raised which do not affect Silver, it need not respond. In any event and most certainly, the court is convinced that consolidation is the practical solution for this maze of proceedings.

In essence—and despite the obvious complexity—consolidation of the two cases will promote judicial economy. The court will be concerned with only one administrative record in both actions; there will be no need to monitor extra motions, such as for extensions of time or for summary judgment, etc.; and consolidation will permit the court to

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[1] *Smith-Corona Group, Consumer Products Division, SCM Corporation* v. *United States, et al.*, 1 CIT—— Slip Op. 80-17 (1980).

resolve all issues relating to the contested administrative determination in a single legal proceeding, albeit complicated.

For the foregoing reasons, it is hereby ORDERED:

1. That the motion for consolidation by Brother is granted; and
2. That the alternative motion for severance by Silver is denied.

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(Slip Op. 80–19)

FARR MAN & CO., INC. AND THE NATIONAL SUGAR REFINING COMPANY, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 79–10–01490

*Memorandum Opinion and Order on Plaintiffs' Motion for Three-Judge Panel*

[Plaintiffs' motion granted.]

(Dated December 31, 1980)

*Barnes, Richardson & Colburn* (*Rufus E. Jarman, Jr.*, on the brief) for the plaintiffs.

*Alice Daniel*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Madeline B. Kuflik* on the brief), for the defendant.

RE, C.J.: Plaintiffs have brought this action to obtain a refund of import fees which they claim were improperly assessed pursuant to Presidential Proclamation No. 4547 of January 20, 1978, upon raw sugar cane imported from Argentina. Pursuant to the provisions of rule 4.13 of the Rules of the U.S. Customs Court,[1] plaintiffs, prior to notice of trial, moved for assignment of this action to a three-judge panel.

Plaintiffs contend that the four issues stated in their motion warrant consideration of this case by a three-judge panel. The defendant disagrees.

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[1] *Rule 4.13 Application for Three-Judge Panel.*

Any party to an action may move, after issue has been joined but no later than 10 days after the filing of a notice of trial, for the designation by the chief judge of three judges of the court to hear and determine the action. Such motion shall be filed with the clerk of the court and referred to the chief judge. It shall state specifically the issue of the constitutionality of an act of Congress, a proclamation of the President or an Executive order, or the broad or significant implications in the administration or interpretation of the customs laws claimed to be involved, and shall otherwise conform to the requirements of Rule 4.12(b). The time to respond and the filing of briefs, memoranda, and affidavits shall be governed so far as applicable by rules 4.12(c) and (d).

Plaintiffs filed their motion prior to November 1, 1980 when the Customs Courts Act of 1980, Public Law 96–417, 94 Stat. 1727, became effective together with the Rules of the United States Court of International Trade.

Rule 77(d)(2), U.S. Court of International Trade, effective November 1, 1980:

*Assignment to Three-Judge Panel.* An action may be assigned by the chief judge to a three-judge panel either upon motion, or upon his own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, a proclamation of the President, or an Executive order; or has broad and significant implications in the administration or interpretation of the law.

The issues, as framed by the plaintiffs, are as follows:

I. Whether section 22 of the Agricultural Adjustment Act authorizes imposition of special import fees upon specified products from some, but not all countries entitled to most-favored-nation treatment?
II. Whether section 22 authorized discrimination among supplying countries under the facts of this case?
III. Whether imposition of import fees upon Argentine sugar without similar imposition upon sugar from all other countries violates the "most-favored-nation principal [*sic*]," and the statutes, treaties and trade agreements incorporating that principle?
IV. When does merchandise "enter the United States" for purposes of the effective date of a proclamation imposing duty?

The statutory basis for the plaintiffs' motion is found in 28 U.S.C. 255, as amended. Pursuant to the provisions of section 255, the chief judge shall designate a three-judge panel of the court to hear and determine any civil action which he finds:

> * * * (1) raises an issue of the constitutionality of an act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws.

In this case the decision of the chief judge to designate a three-judge court rests upon the finding that it raises an issue of the constitutionality of an act of Congress or a Presidential proclamation.

Sugar cane and sugar beets are important domestic farm crops subject to the price support operations of the United States Department of Agriculture. Production is controlled by the Department of Agriculture to allow orderly marketing and pricing of domestic sugar. Section 22 of the Agricultural Adjustment Act, as amended (7 U.S.C. 624).

Congress authorized certain procedures under which the President may impose import fees upon sugar imported into the United States which renders or tends to render ineffective, or materially interfere with, the price support operations being conducted by the Department of Agriculture. Plaintiffs contend that Presidential Proclamation 4547 does not lawfully impose an import fee because it discriminates by country rather than by particular type of product. Plaintiffs also contend that, under the alleged facts, there is no rational basis for restricting the imports from one country as opposed to another, and that the proper procedures required by the Agricultural Adjustment Act were not followed.

Pursuant to section 22 of the Agricultural Adjustment Act, the President is empowered to cause an investigation to be made. On the basis of that investigation and the report to him of findings and recommendations the President is authorized to impose an import fee.

By Presidential Proclamation 4547 an import fee was proclaimed upon the imported sugar cane.

It is well established that Congress may authorize the President to ascertain facts which determine when duties may be imposed, suspended, varied or removed. See, e.g., *J. W. Hampton, Jr., & Company* v. *United States*, 276 U.S. 394 (1928). However, a challenge to Presidential action necessarily involves such questions as whether the delegation is constitutional; whether the President has exercised the powers within the terms of the statutory delegation or other source of powers; or whether there has been compliance with the congressionally prescribed procedure.

The defendant cites the case of *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 79 Cust. Ct. 163, C.R.D. 77–6, 435 F. Supp. 1224 (1977), for the proposition that a three-judge court should not be designated unless the chief judge finds special or exceptional circumstances which indicate that the action has broad or significant implications in the administration or interpretation of the customs laws. 79 Cust. Ct. at 165–166. In the *SCM* case no issue was raised which pertained to the constitutionality of a statute, a proclamation of the President, or an Executive order. Since *SCM* dealt with subdivision (2) of 28 U.S.C. 255, rather than subdivision (1), it is clearly not dispositive of the question presented in the case at bar.

Accordingly, upon the pleadings and motion in this action, the court has concluded that there is a sufficient showing that the action raises issues of the constitutionality of an act of Congress or a proclamation of the President. These issues require a three-judge panel for their consideration and determination.

The plaintiffs' motion that the chief judge designate a three-judge panel is granted.

IT IS HEREBY ORDERED that the following judges of this court serve as members of that panel: Morgan Ford, Scovel Richardson, and Frederick Landis.

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(Slip Op. 80–20)

ASAHI CHEMICAL INDUSTRY COMPANY, LIMITED, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT; AMERICAN YARN SPINNERS ASSOC., PARTY-IN-INTEREST

Court No. 80–5–0755–S

*Memorandum Opinion and Order*

(Dated: December 30, 1980)

RAO, Judge: Plaintiff, Asahi Chemical Industry Company, Ltd. (hereinafter Asahi) has moved for an order granting leave to file an

amended complaint in this antidumping case, severed from *Asahi Chemical Industry Company, Ltd. et al.* v. *United States, American Yarn Spinners Association, Party-in-Interest,* court No. 80–5–00755, by order of October 9, 1980. Its proposed complaint incorporated by reference paragraphs 1 through 59 of the complaint filed in court No. 80–5–00755, makes 51 additional allegations and adds counts XVI through XXI, as well as a statement requesting specified and general relief.

The defendant's response includes a memorandum in partial opposition to plaintiff's motion and a cross-motion for a setting of time within which to file the administrative record and respond to the amended complaint. It is defendant's position that Asahi's attempt to file an amended complaint incorporating by reference allegations and counts in court No. 80–5–00755 does not apprise defendant of the allegations and counts which defendant must answer. The basis for defendant's opposition to Asahi's amended complaint is that, by severing its cause of action from that of the other plaintiffs, Asahi has made it impossible to determine from the papers filed in the severed action what its contentions are.

The rules concerning severance of actions in this court have been generally liberally applied. The predecessor to the current rule, which would have governed had not the Customs Court Act of 1980 been enacted and the ensuing Rules of this court required to be promulgated, merely provided that the court may order a severance and separate proceeding or trial on any claim or issue. The current rule 42(b) is couched in terms of expedition and economy and provides that "the court, in furtherance of convenience or to avoid prejudice * * * may order a separate trial of any claim * * *."

This court has permitted severance to permit the determination of particular issues (see *Ataka America, Inc.* v. *United States,* 79 Cust. Ct. 171, C.R.D. 77–8 (1977); *F. W. Woolworth Co.* v. *United States,* 71 Cust. Ct. 272, C.R.D. 73–26 (1973); and *Nichols & Company, Inc.* v. *United States,* 80 Cust. Ct. 26, C.D. 4734 (1978), *aff'd* 66 CCPA —, C.A.D. 1217, 586 F. 2d 826 (1978)) without much discussion as to the pleading requirements in severed actions.

Besides rule 42(b), supra, we can look for guidance in the matter before us to rule 10(c) which pertains to adoption by reference. The clear language of this rule indicates that statements in a pleading may be adopted by reference in * * * another pleading or in any motion and that a copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes.

It would appear that convenience may not best be served by having Asahi reiterate all the allegations of a complaint, a copy of which is already in defendant's possession and a copy of which is in the file of

this case. Expedition and economy are best served by keeping to a minimum the number of pleadings and other papers to be incorporated in a record which already evidences signs of becoming voluminous. Since a copy of the complaint in court No. 80–5–00755 is already part of the file of court No. 80–5–00755–S, it is unnecessary for Asahi to attach a copy of it to its amended complaint for purposes of incorporation by reference.

Plaintiff Asahi did not file a reply to defendant's cross-motion and the American Yarn Spinners Association has filed no responses in the matter currently before the court. In light of the amount of time that has elapsed since defendant filed its cross motion for additional time within which to file the administrative record and its answer, the court will allow an additional 30 days from the date of this order for the filing of the record and an additional 60 days from the date of this order for the filing of defendant's answer, which may incorporate by reference its answer to the complaint in court No. 80–5–00755.

Accordingly, it is ordered that:

1. Plaintiff's motion for leave to file the amended complaint annexed to its motion is hereby granted and the amended complaint is deemed filed from the date of this order;

2. The defendant's cross-motion is granted and the Department of Commerce is given 30 days from the date of this order in which to file the administrative record upon which the Secretary of the Treasury's less than fair value determination is based; and

3. The defendant is given 60 days from the date of this order within which to file its answer or other response to the amended complaint.

# Judgment of the United States Court of International Trade in Appealed Case

DECEMBER 29, 1980

Appeal 79–39.—General Electric Company *v.* United States.—CLOCK-RADIOS—SOLID-STATE (TUBELESS) RADIO RECEIVERS—OTHER RADIO RECEPTION APPARATUS—TSUS—SUMMARY JUDGMENT.—C.D. 4822 affirmed May 1, 1980 (C.A.D. 1245), rehearing denied July 3, 1980.

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# International Trade Commission Notices

*Investigations by the United States International Trade Commission*

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,
*Commissioner of Customs.*

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| In the Matter of CERTAIN INCLINED-FIELD ACCELERATION TUBES AND COMPONENTS THEREOF | Investigation No. 337–TA–67 |

*Notice of Termination of Investigation*

AGENCY: U.S. International Trade Commission.

ACTION: Termination of investigation.

SUPPLEMENTARY INFORMATION: Upon receipt of a complaint filed on May 17, 1979, the Commission on June 27, 1979, published a notice of institution of an investigation (44 F.R. 37567), pursuant to section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, of alleged unfair methods of competition and unfair acts in the unauthorized importation and sale of inclined-field acceleration tubes and components thereof.

On December 16, the Commission unanimously determined that there was a violation of the statute in the importation or sale of certain inclined-field acceleration tubes and components thereof that infringe claims 2–6 of U.S. Letters Patent 3,308,323 and that an exclusion order is the appropriate remedy. The Commission unanimously determined, however, that the public interest factors enumerated in subsection 337(d) of the statute preclude the imposition of a remedy.

Copies of the Commission's Action and Order, Opinion, and any other public documents in this investigation are available for inspection by the public during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161.

FOR FURTHER INFORMATION CONTACT: Michael B. Jennison, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–523–0189.

By order of the Commission.

Issued: December 29, 1980.

KENNETH R. MASON,
*Secretary.*

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In the Matter of
CERTAIN AIRTIGHT WOOD STOVES } Investigation No. 337–TA–92

*Order No. 1*

Pursuant to my authority as chief administrative law judge of this Commission, I hereby designate Administrative Law Judge Donald K. Duvall as presiding officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: December 29, 1980.

DONALD K. DUVALL,
*Chief Administrative Law Judge.*

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In the Matter of
CERTAIN AIRTIGHT CAST-IRON STOVES } Investigation No 337–TA–69

*Notice of Termination of Respondent*

AGENCY: U.S. International Trade Commission.

ACTION: Termination of Crane Industries as party respondent.

SUPPLEMENTARY INFORMATION: Upon receipt of a complaint filed on May 23, 1979, the Commission on July 12, 1979, published a notice of institution of the present investigation in the Federal Register (44 F.R. 40732). That notice stated that the investigation was being undertaken to determine whether respondents' stoves were infringing Jotul's common law trademarks, infringing Jotul's registered U.S. trademarks, being passed off as Jotul's products, or being deceptively advertised and marketed.

On November 24, 1980, the complainants and the Commission investigative attorney moved to terminate respondent Crane Industries because it was no longer doing business. The motion to terminate Crane was unopposed by the other parties to the investigation.

Copies of the Commission's Action and Order, and any other public documents in this investigation are available for inspection by the public during official working hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone (202) 523–0161.

FOR FURTHER INFORMATION CONTACT: Jeffrey Neeley, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–523–0359.

By Order of the Commission.

Issued: December 30, 1980.

KENNETH R. MASON,
*Secretary.*

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| In the Matter of CERTAIN WET MOTOR CIRCULATING PUMPS AND COMPONENTS THEREOF | Investigation No. 337–TA–94 |

*Order*

Pursuant to my authority as chief administrative law judge of this Commission, I hereby designate Administrative Law Judge Janet D. Saxon as presiding officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: December 31, 1980.

DONALD K. DUVALL,
*Chief Administrative Law Judge.*

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| In the Matter of CERTAIN UNIVERSAL JOINT KITS, COMPONENTS THEREOF, AND TRUNNION SEALS USED THEREWITH | Investigation No. 337–TA–93 |

*Order No. 1*

Pursuant to my authority as chief administrative law judge of this Commission, I hereby designate Administrative Law Judge Donald K. Duvall as presiding officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: December 31, 1980.

DONALD K. DUVALL,
*Chief Administrative Law Judge.*

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| In the Matter of<br>LEATHER WEARING APPAREL FROM URUGUAY | Investigation No. 701–TA–68<br>(Final) |

AGENCY: United States International Trade Commission.

ACTION: Institution of a final countervailing duty investigation to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of allegedly subsidized imports from Uruguay of leather wearing apparal, provided for in item 791.76 of the Tariff Schedules of the United States (TSUS).

EFFECTIVE DATE: December 12, 1980.

FOR FURTHER INFORMATION CONTACT: Robert Eninger, Office of Investigations, 202–523–0312.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 15, 1980, a petition was filed with the U.S. International Trade Commission and the U.S. Department of Commerce on behalf of domestic producers of leather wearing apparel alleging that a bounty or grant is being bestowed on leather wearing apparel imported from Uruguay. On November 26, 1980, the Commission unanimously determined, on the basis of the information developed during the course of investigation No. 701–TA–68 (preliminary), that there is a reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Uruguay of leather wearing apparel, provided for in item 791.76 of the TSUS, which are allegedly being subsidized by the Government of Uruguay. As a result of the Commission's determination, the Department of Commerce (the administering authority) continued its investigation into the question of subsidized sales.

On December 12, 1980, the Department of Commerce made a preliminary determination under section 703(b) of the Tariff Act of 1930 that there is a reasonable basis to believe or suspect that the

Government of Uruguay grants to manufacturers, producers, or exporters of certain leather wearing apparel benefits which constitute a subsidy within the meaning of the countervailing duty law. The merchandise covered by the Department of Commerce's investigation is leather wearing apparel currently provided for in TSUS item 791.76. Accordingly, effective December 12, 1980, the Commission instituted investigation No. 701–TA–68 (final) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of such merchandise. This investigation will be conducted according to the provisions of part 207 of the Commission's rules of practice and procedure (19 CFR 207, 44 F.R. 76457). The final determination by the Department of Commerce of whether subsidies are being provided by the Government of Uruguay will be made not later than February 25, 1981, unless the investigation is extended.

### STAFF REPORT

A staff report containing preliminary findings of fact will be available to all interested parties on February 27, 1981.

### WRITTEN SUBMISSIONS

Any person may submit to the Commission on or before March 16, 1981, a written statement of information pertinent to the subject of this investigation. A signed original and nineteen (19) true copies of each submission must be filed at the Office of the Secretary, U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. 20436. All written submissions, except for confidential business data, will be available for public inspection.

Any submission of business information for which confidential treatment is desired shall be submitted separately from other documents. The envelope and all pages of such submissions must be clearly labeled "Confidential Business Information." Confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's rules of practice and procedure (19 CFR 201.6).

### PUBLIC HEARING

The Commission will hold a public hearing in connection with this investigation on March 18, 1981, in the hearing room of the U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. 20436, beginning at 10:00 a.m., e.s.t. Resquets to appear at the hearing should be filed in writing with the Secretary to the

Commission not later than the close of business (5:15 p.m., e.s.t), March 4, 1981. All persons desiring to appear at the hearing and make oral presentations must file prehearing statements and should attend a prehearing conference to be held at 10:00 a.m., e.s.t., on March 5, 1981, in Room 117 at the U.S. International Trade Commission Building. Prehearing statements must be filed on or before March 16, 1981. For further information concerning the conduct of the investigation, hearing procedures, and rules of general applications, consult the Commission's rules of practice and procedure, part 207, subparts A and C (19 CFR 207), and part 201, subparts A through E, (19 CFR 201).

The Commission has waived Commission rule 201.12(d) as amended, "Submission of prepared statements," in connection with this investigation. This rule stated that copies of witnesses' prepared statements should be filed with the Office of the Secretary of the Commission not later than 3 business days prior to the hearing and submission of such statements shall comply with sections 201.6 and 201.8 of this subpart. It is, nevertheless, the Commission's request that parties submit copies of witnesses' prepared testimony as early as practicable before the hearing in order to permit Commission review.

This notice is published pursuant to section 207.20 of the Commission's rules of practice and procedure (19 CFR 207.20, 44 F.R. 76458).

By order of the Commission.

Issued: December 31, 1980.

KENNETH R. MASON,
*Secretary.*

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| In the Matter of CERTAIN COIN OPERATED AUDIO-VISUAL GAMES AND COMPONENTS THEREOF | Investigation No. 337–TA–87 |

*Notice of Termination of Respondent*

AGENCY: U.S. International Trade Commission.

ACTION: Termination of investigation as to respondent Taito America Corp.

SUMMARY: The Commission has terminated the above-captioned investigation as to respondent Taito America Corp. based upon Taito's sworn statement that it is not and has not imported the articles in controversy in this investigation.

SUPPLEMENTARY INFORMATION: This investigation is being conducted under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and concerns alleged unfair trade practices in the importation into

and sale in the United States of certain coin operated audio-visual games and components thereof. The complainant, Midway Mfg. Co., the Commission investigative attorney, and respondent Taito America Corp. jointly moved to terminate the investigation as to Taito America on the basis of Taito America's sworn affidavit that it is not now, nor this investigation.

Copies of the Commission's Action and Order and all other non-confidential documents filed in connection with the investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, NW., Washington, D.C. 20436, telephone 202–523–0155.

FOR FURTHER INFORMATION CONTACT: Clarease E. Mitchell, Esq., Office of the General Counsel, telephone 202–523–0148.

By order of the Commission.

Issued: January 7, 1981.

KENNETH R. MASON,
*Secretary.*

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| In the Matter of CERTAIN COIN-OPERATED AUDIO VISUAL GAMES AND BROCHURES FOR THE ADVERTISEMENT THEREOF | Investigation No. 337–TA–87 |

*Notice of Commission Request for Comments Regarding Settlement Agreement*

AGENCY: United States International Trade Commission

ACTION: Request for public comment on proposed settlement agreement.

SUMMARY: The proposed settlement agreement would result in termination of this investigation as to respondents Universal Co., Ltd., Universal U.S.A. Inc., and Sunrise New Sound, Inc. This notice requests comments from the public on the proposed settlement agreement within 30 days of publication of this notice in the Federal Register.

DATES: Comments will be considered if received within 30 days of publication of this notice. Comments should conform with section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8), and should be addressed to Kenneth R. Mason, Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

SUPPLEMENTARY INFORMATION: On November 18, 1980, complainant Midway Mfg. Co. and respondents Universal Co., Ltd., Universal U.S.A., Inc. and Sunrise New Sound, Inc. (the importer of record for Universal Co., Ltd., and Universal U.S.A.) filed a joint motion to terminate this investigation as to those respondents on the basis of a settlement agreement. On November 24, 1980, the presiding officer recommended that the joint motion be granted.

Notice of the institution of the investigation was published in the Federal Register of June 25, 1980, (45 F.R. 124).

WRITTEN COMMENTS REQUESTED: In order to discharge its statutory obligation to consider the public interest, the Commission seeks written comments from interested persons regarding the effects of terminating this investigation as to respondents Universal Co. Ltd., Universal U.S.A., Inc. and Sunrise New Sound, Inc. on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers. All written comments must be filed with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register. In addition, pursuant to 19 CFR section 210.14(a)(2), the Commission has requested comments from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs Service.

ADDITIONAL INFORMATION: The original and 19 true copies of all written submissions must be filed with the Secretary to the Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202–523–0161. All comments must be filed no later than 30 days after publication of this notice in the Federal Register. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request in camera treatment. Such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons the Commission should grant such treatment. The Commission will either accept the submission in confidence or return it. All nonconfidential written submissions will be available for public inspection at the Secretary's Office.

FOR FURTHER INFORMATION CONTACT: Clarease E. Mitchell, Esq., Office of the General Counsel, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202–523–0148.

By order of the Commission.

Issued: January 7, 1981.

KENNETH R. MASON,
*Secretary.*

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## U.S. Customs Service

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